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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-469

BRADFORD TOWNSHIP, et al.,

Petitioners,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[All italics ours; (App.) means Appendix to this Petition; (R. App.) means Appendix from Court of Appeals.]

Petitioners are comprised of four Townships, 39 individuals who reside in the area through which the proposed Illinois Toll Highway is planned to cross and an unincorporated association of residents and land owners

in that same area affected by the proposed construction. They pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause dismissing Petitioners' Complaint for failure to state a claim upon which relief can be granted and which judgment was entered and became final on June 22, 1972 by affirmance of the District Court's decision dismissing Petitioners' Complaint for failure to state a cause of action upon which relief can be granted (App. 1 *et seq.*).

THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported at the present time.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered and became final on June 22, 1972 (App. 1 *et seq.*). The jurisdiction of this Court is invoked under provisions of §1254 of the Judicial Code (28 U.S.C. §1254). (App. 15a).

STATUTES INVOLVED.

The various statutes involved are listed in the index and set forth in the appendix.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in holding that Petitioners were not denied due process of law when the Illinois State Toll Highway Authority started damaging and destroying their environment by building a tollway extension in violation of Petitioners' right to a protected and healthful environment without holding the public meetings required by state law at which the decision to build and to finance the extension should have been made.

2. Whether the Appellate Court erred in holding Section 4331 of the National Environmental Policy Act to be ineffective and in dismissing Petitioners' complaint based thereon for a failure to state a cause of action, in contravention of the clear language of the provision which bestows rights upon Petitioners and responsibilities upon Respondents.

STATEMENT OF THE CASE.

This appeal arises from a civil action brought in the United States District Court for the Northern District of Illinois under 28 U.S.C. §1331 and §1343(4) by Petitioners, Plaintiffs below, against Defendant-Respondent Authority, its board of directors, including ex officio officers, and its executive administrator, to enjoin them from constructing an extension to the East-West Toll Highway.[1]

The extension is planned to run west from Aurora, Illinois, to the outskirts of Rock Falls, Illinois. It will run diagonally from Aurora to the southern outskirts of De Kalb; it then parallels Alternate U.S. 30 to Rochelle, and proceeds diagonally to Dixon, Sterling and Rock Falls (R. App. 3, 7). This trapezoidal route is referred to by the Toll Highway Authority as a "diagonal curve." The extension is 69 miles long. As Petitioners have alleged in their Complaint below, the construction will completely destroy many of the finest agricultural acres in the nation. The majority of these acres could be preserved if the toll highway extension were built parallel to section lines rather than on the diagonal curve which will maximize severance and isolation of land. The present proposal removes 3,361 acres by severance (R. App. 7). The present estimated isolation is 2,102 acres (R. App. 7). The proposed extension itself consumes 2,365 acres (App. 7). The construction of this extension will close local roads and disrupt social and emergency services.

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[1] Petitioners' Complaint below was dismissed on Respondents' motion to dismiss the Complaint and, therefore, under *Mosher v. City of Phoenix*, 287 U.S. 29 (1932), the allegations of the Complaint are taken as true.

The present plans for the tollway compel the closing of numerous local roads which are now used by emergency vehicles and all types of social service vehicles (R. App. 1, 13). The indiscriminate closing of these roads, rendering residents in the area inaccessible to ambulance, fire and police protection, will give rise to unhealthy and unsafe conditions (R. App. 1, 13).

Air pollution, which adversely affects humans, crops and animals, is set forth in the Complaint (R. App. 4-5, 12, 13). This air pollution is caused not merely by the presently existing traffic, but mostly by traffic generated as the direct result of the extension. The traffic and revenue report of Defendant Toll Highway Authority declares that a major portion of the traffic using the extension will be traffic which the construction of the extension itself generates, (termed "generated traffic"), which would not otherwise exist on any road (R. App. 6). The same traffic and revenue report states that long distance traffic has been taken by I-80, a new limited-access highway, and that only short distance commuter traffic remains for the extension in addition to the traffic of a generated nature. Interstate 80 is a free highway which also runs East and West, and is only a short distance to the South of the proposed extension (R. App. 6, 13). Furthermore, the Toll Highway Authority contemplates the development of industry and housing to line the proposed route (R. App. 6, 7, 8, 12). In fact, it is relying on this land development to create traffic to use the highway. This will inevitably take more acres out of agricultural production and add to drainage and pollution problems. These emissions of air pollutants caused by the construction of the extension will affect the quality and quantity of agricultural production in the vicinity of the toll

highway extension, will damage ornamental plants, and will affect both human and animal health. (R. App. 4-5, 12).

Furthermore, the State Toll Highway extension is proposed to cross a low lying area historically known as the "Great Swamp", which has been saved by use of proper drainage techniques, primarily drainage tiling, as some of the richest, most drought resistant farm land in America (R. App. 4). The present plans as alleged by Petitioners in their Complaint, show no understanding, concern or planning to avoid drainage disruption, flooding, erosion and loss of additional agricultural acres to swamp land where pests can breed. The water table is still high (R. App. 4, 12), and the destruction or disruption of the vital drainage facilities and present run-off patterns will inevitably lead to the loss of further rich, highly productive farm acres by their reversion to marsh land (R. App. 4, 12). Defendants-Respondents have not made and have no intention of making exploratory surveys to locate and preserve the crucial water drainage tiles, and no drainage system is planned for the tollway to prevent its disruption of existing run-off patterns (R. App. 6-7).

The area which this proposed highway will disrupt is unique in the nation and indeed in the world. The soil is the richest and most productive agricultural soil in the nation (R. App. 4, 11). It is also the most drought resistant soil in the State of Illinois (R. App. 4, 11) as well as the entire nation. The climate is excellently suited for agriculture (R. App. 4) and is the most stable climate for agriculture in the State and the nation (R. App. 4). The combination of these three outstanding factors in one place is rare (R. App. 4), rendering the soil production index (the amount of usable crop per acre) far

higher than the rest of the State and nation (R. App. 4, 11).

Not only is the area outstanding for the production of such consumer crops as sweet corn, soybeans, oats, green beans, peas, lima beans, tomatoes, alfalfa, asparagus and pumpkins (R. App. 4), but a substantial portion of the seed corn used to grow the sweet corn consumed by the nation is grown in this area (R. App. 4) because it is remarkably well suited to producing high quality seed.

Despite the importance of this area in meeting the nation's need for food, and despite the unique qualities which make this area agriculturally outstanding, Defendants did not consider any aspect of the environment in determining the route of the highway, nor did they consider whether the environmental damage might be too high a social cost for the possible social benefit. Defendants never commissioned or caused to be made any ecological or environmental study for the said proposed route (R. App. 6), although they did commission an engineering report concerning the specifications of the proposed extension itself and a traffic and revenue report concerning its profitability (R. App. 6).

The Authority, its members and officers, without studying the environmental cost or considering any alternative route, determined to construct this road through this unique area (R. App. 6). Once this determination was made, no study was commissioned or made to determine how the environmental effects of such construction could be minimized, and no efforts are presently being made to minimize the environmental damage which will ensue (R. App. 6-7).

Petitioners' Complaint maintains that this utter disregard for the environment is in violation of the national

policy established by two federal statutes, the National Environmental Policy Act (R. App. 7-8, 13-14), and the Environmental Quality Improvement Act (R. App. 8-9) and that this national policy is binding on the states.

In their Complaint, Petitioners seek an injunction permanently restraining construction of the tollway if the Court should find on trial that there is no valid justification for the road when environmental factors are considered; or alternatively, they seek to enjoin construction until studies are made by the Authority, its members and officers to determine the relative effect on the environment of alternatives and to balance the environmental cost against the social gain, all determinations being proven to have been made on evidence and facts warranting such a decision.

In addition, the decision to extend the tollway was made in closed, secret meetings of the Toll Highway Authority, not in public meetings with reasonable and effective prior notice as required by state law (R. App. 10). All the Petitioners have an immediate interest in the area of the proposed extension to the East-West Tollway. The four townships are all situated on its route, and each will be affected by its construction (R. App. 1). All of the individual Plaintiffs are residents of the area through which the proposed extension is to pass, and all have a direct interest in the quality of the environment in which they live (R. App. 2). Some are not only residents of the area, but are also owners of farms which will be dissected by the proposed route (R. App. 2). The Northern Counties Social Action Council is an unincorporated association whose members are all residents of the affected area and who have a substantial stake in the future of the environment in which they live (R. App. 2). Many of the Peti-

tioners, although they own no land which may be taken and thus would not be parties to any condemnation action, nevertheless will be affected by the environmental damage and construction created by the construction of the extension. Furthermore, the environmental damage which they will suffer is neither measurable in dollar terms nor compensable. Because the local process of condemnation is neither adequate nor available to all, Petitioners had only one effective opportunity to protect their property and environmental rights, namely attending the open meetings of the Toll Highway Authority and thereby influencing the Board of Directors in their decisions on these matters (R. App. 10). Plaintiffs would have attended the public meetings and put forth their arguments against the road at that time. Plaintiffs therefore further seek an injunction until public hearings are held in accordance with the Illinois Meetings of Public Agencies Act.

Respondents moved to dismiss the Petitioners' Complaint on two grounds: first, lack of federal jurisdiction, and second, the Complaint failed to state a claim upon which relief could be granted (R. App. 14). The District Court granted Respondents' motion to dismiss but its opinion and order did not make it clear on which of the two grounds the action had been dismissed. Petitioners and Respondents argued as to both grounds before the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for the Seventh Circuit affirmed the District Court on the basis of a failure to state a cause of action upon which relief could be granted and made no mention of the issue of federal jurisdiction. Petitioners now appeal the Seventh Circuit decision and believe that if a federal cause of action is found by this Honorable Court the issue of federal jurisdiction will by that decision also be resolved.

ARGUMENT.

I.

THE APPELLATE COURT ERRED IN RULING THAT A VIOLATION OF THE ILLINOIS MEETINGS OF PUBLIC AGENCIES ACT WHICH DENIED PETITIONERS THEIR OPPORTUNITY TO DEFEND THEIR RIGHT TO A PROTECTED AND HEALTHFUL ENVIRONMENT DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

AND

THE DECISION OF THE APPELLATE COURT CONTRAVENES NUMEROUS AND REPEATED DECISIONS OF THIS COURT AND CONFLICTS WITH DECISIONS OF THE SIXTH AND NINTH CIRCUITS AND THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN HOLDING THAT A STATE AGENCY'S ACT RESULTING IN THE TAKING OR DAMAGING OF LAND AND THE GENERAL ENVIRONMENT IN VIOLATION OF THE PROCEDURAL PROCESS SPECIFIED BY THE STATE SOVEREIGN IS NOT A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A.

The Seventh Circuit Erred In Holding That The Deprivation Of A Federally Recognized Right By A State Agency Acting In Violation Of Law Is Not A Violation Of Due Process Guaranteed By The Fourteenth Amendment To The United States Constitution And Section 1983 Of The Federal Civil Rights Act.

The United States Court of Appeals for the Seventh Circuit held that:

> Plaintiffs-appellants allege that no public hearings were held as required by the Illinois Meetings of

Public Agencies Act. Suffice it to say that this is a state statute and, if valid,[2] might provide a cause of action in the state courts. It does not give rise to a cause of action cognizable by a federal court, nor does a failure to follow the requirements of the Act constitute a violation of a federally protected constitutional right. See *Green Street Association* v. *Daley*, 373 F. 2d 1 (1967) (App. 6a).

This position is without support and totally opposed to the holdings of this Honorable Court.

The Petitioners in this case will be damaged by the building of the extension of the East-West Tollway in ways not calculable in dollar terms. The land owner who can be made a party to a condemnation proceeding cannot prove damage in a dollar amount for the environmental and ecological upset and destruction which will affect his farm, his crops, his family and himself. Condemnation at best treats land solely as an economic asset. It is not cognizant of nor is it capable of handling the environmental rights recently recognized and protected by Congress in the National Environmental Policy Act, 42 U.S.C. §4331(c) and by Article XI, §2 of the Illinois Constitution of 1970.

Furthermore, many of the Petitioners are not land owners and are not parties to any condemnation. (R. App. 1, 2). However, they must all breathe the degraded air, suffer large pools of stagnant water—perhaps large areas of marshland—where mosquitoes will breed and other pests reside, and be affected to some degree by the reduction of productive farm land and the

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[2] The validity of the Illinois Meetings of Public Agencies Act was not questioned by either party, and the court's statement "if valid" is in derrogation of the presumption of constitutionality and legality of all statutes.

deleterious effects on plant yield and health of humans and animals (R. App. 4-5, 6-7, 10). All will, in addition, suffer from the interruption and closing of local roads, rendering many of them either inaccessible or less accessible to emergency services such as fire, police and ambulance, and such social services as school buses (R. App. 13).

Because condemnation cannot protect the environment and is not even available to many of the Petitioners, their federally guaranteed rights to property and a healthful and protected environment must be protected by alternative proceedings designed and able to do so. The State of Illinois has designed such an alternative method of proceeding to ensure that those affected by governmental action can protect their environmental interests by being present when such decisions are made and influencing the discussions and decisions by their presence. Under the pressure of their presence and participation the decision-makers will be mindful of the environmental results of their plans and avoid or minimize such disturbance and destruction. Public meeting procedure ensures that the interests of those affected will be heard and their environmental interests protected, since environmental destruction can never be compensated or undone. This proceeding is established in Illinois by the Illinois Meetings of Public Agencies Act, 102 Ill. Rev. Stat. §42 *et seq.* (1969) (App. 21-22). The Illinois State Toll Highway Authority, its directors and administrators, all Respondents herein, are covered by this Act and were required to make the policy decisions to build the extension and the decision to fund it in public meetings.

Petitioners allege in their complaint, which must be taken as true on this Motion to Dismiss, *Mosher* v. *City*

of Phoenix, 287 U.S. 29 (1932), that the meetings required by the Illinois Meetings of Public Agencies Act to be open and public, were closed and secret and thus violated the Act (R. App. 10). Despite the fact that proper public meetings were not held, the Authority threatened condemnation in pursuance of its illegally passed resolutions at the time that this action was filed, and has since instituted such condemnation actions.

In these circumstances, the Court of Appeals for the Seventh Circuit in affirming the District Court's dismissal of Petitioners' Complaint for failure to state a cause of action has contravened the authority of this Court in failing to recognize three different and distinct violations of due process guaranteed by the United States Constitution.

First, this Court has long recognized that although the sovereign may be unrestrained in its power of eminent domain, once the sovereign places restrictions on its exercise, those limitations bind the sovereign. In *Boom Co.* v. *Patterson,* 98 U.S. 403, 406 (1878), this Court stated:

> The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. . . . But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance.

In the later case of *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago,* 166 U.S. 226, 241 (1897), the sovereign

contravened the limitations it placed on its power of eminent domain (failure to pay compensation to the owner as required by state law) and this Court held that due process guaranteed by the Fourteenth Amendment of the United States Constitution was therefore violated. *Accord*: *Cuyahoga River Power Co.* v. *City of Akron*, 240 U.S. 462 (1916).

This Court further held in *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226, 234 (1897), that no matter which state governmental branch or agency violates a limitation placed on its exercise of eminent domain, the constitutional prohibition against taking without due process is violated, and that each state agency in proceeding to take property must keep within every regulation on the exercise of that power.

One of the limitations on the exercise of eminent domain which the State of Illinois placed on its agencies is that all meetings where resolutions are adopted determining the policy of whether a particular public project should be undertaken or funded, such as the meetings now at issue, must be public meetings.[3] The Illinois State Toll Highway Authority as a state agency is bound by that regulation. The Authority violated that limitation when it adopted resolutions first that an extension to the tollway was necessary and second to float bonds to finance it at closed and secret meetings (R. App. 10) to the detriment of Petitioners' property and environmental rights (R. App. 10-11) and thereby violated their federally guaranteed right to due process.

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[3] The meetings concerned in this case were policy meetings and did not fall within any exception for meetings concerned with selecting particular parcels of land on which condemnation actions were to be begun.

Second, the Fourteenth Amendment guarantee of due process, like the Fifth Amendment guarantee of due process, was intended to preserve the citizen from damage to himself, his property and his civil rights caused by the arbitrary and capricious action of state officials clothed with the power of the state. As Mr. Justice Field stated for this Court in *Missouri Pacific Railway Company* v. *Humes,* 115 U.S. 512 (1885):

> In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guarantees of private rights, to give increased security against the arbitrary deprivation of life or liberty, and arbitrary spoilation (sic) of property. *Id.* at 519.

Accord: *Bank of Columbia* v. *Okely,* 4 Wheat. (17 U.S.) 235, 244 (1819); *U. S.* v. *Cruikshank,* 92 U.S. 542, 554 (1875). When governmental agencies violate a legal duty and thereby deprive a citizen of his property or civil rights, they violate due process. As the United States Court of Appeals for the Sixth Circuit recognized in *Weaver* v. *Pennsylvania-Ohio Power & Light Co.,* 10 F. 2d 759, 760 (6th Cir. 1926), the alleged collusion of government officials in an eminent domain proceeding would, if substantiated, be a violation of due process guaranteed by the Fourteenth Amendment. This is consistent with the holding in *Donovan* v. *Mobley,* 291 F. Supp. 930, 934, (C.D. Calif. 1968), *modified on other grounds,* 433 F. 2d 738 (9th Cir. 1970), where the Court rightly

held that although there may have been no compulsion on the state to establish a particular procedure, once established it could not be violated by governmental agencies or officers. Where the State of Illinois required that the Authority act in public and open meetings and the Respondents disregarded this law and acted in closed and secret meetings they acted arbitrarily and capriciously and violated due process guaranteed by the Fourteenth Amendment to the United States Constitution.

Third, Petitioners were denied due process on still another ground. Due process requires a proceeding following the ordinary mode prescribed by law, adapted to the end to be obtained, and held at an effective time. *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 708 (1884). The time to protect the environment is before any damage is done to it. Money cannot replace it and no legal proceeding can undo destruction already completed. The State of Illinois mandated a proceeding which guaranteed that proper consideration would be given to the rights and property of Petitioners before potentially detrimental action was taken. All citizens who would be affected by environmental degradation and destruction were entitled to participate in this proceeding, whereas only land owners could be made parties to condemnation actions. Respondents' violation of the open meetings act deprived Petitioners of a timely, effective proceeding in compliance with law and thus violated their right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Seventh Circuit cited as its basis for holding that no federal due process question was stated in Petitioners' Complaint a previous Seventh Circuit decision, namely

Green Street Association v. *Daley*, 373 F. 2d 1 (7th Cir. 1967). That case does not support the decision in the case at bar and remains clearly distinguishable from it. In that case and in *Harrison-Halsted Community Group, Inc.* v. *Housing & Home Finance Agency*, 310 F. 2d 99 (7th Cir. 1962), cited in the *Green Street* case, the Seventh Circuit held that there had been no violation of due process in a suit to enjoin state eminent domain proceedings for failure to hold public hearings as required by federal regulations under which federal funds were to be given to the state for a proposed state project. Had the federal funding itself been challenged instead of the state's power of eminent domain (which existed for the intended purpose regardless of whether or not federal funds were involved) the decision would undoubtedly have been different. This distinction was recognized by the United States District Court for the Eastern District of Pennsylvania in *Powelton Civic Home Owners Association* v. *Department of Housing and Urban Development*, 284 F. Supp. 809, 823-4 (E.D. Penn. 1968). The case at bar, contrary to *Green Street* and *Harrison-Halsted*, was brought to enjoin a state agency from exercising eminent domain in furtherance of an illegal project authorized in closed and secret meetings in disregard and violation of the state statutory requirement that decisions to undertake and fund public projects be made in mandatory open meetings. It was only after enactment of the Illinois Meetings of Public Agencies Act (App. 21-22), which became state law after the decision in the *Green Street* and *Harrison-Halsted* cases, that a public meeting became mandatory for all state agencies when making policy decisions to authorize construction or fund particular projects. This created an addi-

tional procedural step which must be followed if eminent domain is to be lawfully exercised. *Department of Public Works* v. *Ryan*, 357 Ill. 150, 155-6 (1934); *accord*: *Chicago, B. & Q. R.R. Co.* v. *Chicago*, 166 U.S. 226, 241 (1897). Because Respondents in the case at bar violated a limitation placed on the exercise of eminent domain, due process was violated. The Seventh Circuit should therefore have followed its own precedent in *Progress Development Group* v. *Mitchell*, 286 F. 2d 222 (7th Cir. 1961).

Furthermore, all parties in the *Green Street* and *Harrison-Halsted* cases would have been proper parties to condemnation proceedings since they were either owners or tenants of buildings and land sought to be taken, whereas in the case at bar many of the Petitioners, although sharing the same environment and breathing the same air, are not land owners or tenants and would not be proper parties to a condemnation proceeding. Moreover, neither decision was concerned with environmental rights which could not be properly protected in a condemnation proceeding. Both cases were decided prior to Congress' recognition of the right to a protected and healthful environment, 42 U.S.C. 4331(c) (App. 20) and recognized by the Illinois State Constitution of 1970, Article XI, §2. Since Congress' recognition of the right to a healthful and protected environment, the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 ensure that Petitioners' rights to a protected and healthful environment shall not be impaired or endangered by state governmental action without the observance of due process of law. Due process always expands to protect new rights as they are recognized. *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949); *accord*: *Holden* v. *Hardy*, 169 U.S. 366 (1898).

B.

The Court Of Appeals For The Seventh Circuit Contravened Repeated Holdings Of This Court That A Violation Of State Law Can Be Redressed In Federal Court Where The Federal Guarantee To Due Process Is Also Violated Thereby.

The United States Court of Appeals for the Seventh Circuit is further in direct conflict with the authority of this Court when it held: "Suffice it to say that this is a state statute, and if valid, might provide a cause of action in the state courts. It does not give rise to a cause of action cognizable by a federal court, . . . (App. 6a)."

In the 19th century this Court recognized that where the violation of state law also gave rise to a violation of due process under the federal constitution the Plaintiff had the right to choose whether he would proceed on his federal rights in a federal court or his state rights in a state court. *Smyth* v. *Ames,* 169 U.S. 466, 516 (1898). In this century, this Court has reiterated this principle repeatedly. *Mosher* v. *City of Phoenix,* 287 U.S. 29, 32 (1932). In the famous case of *Monroe* v. *Pape,* 365 U.S. 167, 183 (1960), reversing the Seventh Circuit, this Court held:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

Even the Seventh Circuit has held on a previous occasion that where the exercise of eminent domain will

violate federal constitutional guarantees federal courts will enjoin the condemnation. *Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222 (7th Cir. 1961). In the case at bar Petitioners' property and rights in the environment will be damaged or destroyed by the decision of the Authority to build this extension which was made in closed and secret meetings in contravention of law. The proceeding provided by law and denied to Petitioners by Respondents was the only proceeding authorized which was suited to the protection of the rights involved herein. The deprivation of this proceeding was clearly a deprivation of due process and thus a valid federal cause of action.

This Court should take certiorari and reverse the Seventh Circuit because that decision contravenes numerous decisions of this Court as well as constitutional and statutory provisions which guarantee to Petitioners due process of law. U.S. Const. XIV, §1; 42 U.S.C. §1983. Furthermore, the issue involved in this case is of great importance to the health and welfare of the nation. Historically, this court has enunciated decisions delineating basic principles governing the nature and scope of due process. These decisions clearly include within their scope the protection of Petitioners' environmental rights claimed in the circumstances of this case. This nation can ill afford any confusion which may be caused by failure to reverse the Seventh Circuit at this point in time when it is recognized that land and other environmental resources are not limitless, but indeed are dangerously close to depletion.

II.

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN NOT ENFORCING PETITIONERS' RIGHTS TO A PROTECTED, ENHANCED AND HEALTHFUL ENVIRONMENT UNDER §4331(c) OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND IN NOT ENFORCING RESPONDENTS' DUTIES TO PROTECT AND ENHANCE THE ENVIRONMENT UNDER §4331(a) AND (c) OF THE NATIONAL ENVIRONMENTAL POLICY ACT IN CONTRAVENTION OF THE PLAIN MEANING OF THOSE PROVISIONS

AND

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY NOT ENFORCING §4331(a) AND (c) OF THE NATIONAL ENVIRONMENTAL POLICY ACT DISREGARDED THE RULES ESTABLISHED BY THIS COURT FOR STATUTORY INTERPRETATION, NULLIFIED PROVISIONS OF AN ACT OF CONGRESS, IGNORED THE INTENT OF CONGRESS, AND PLACED ITSELF IN CONFLICT WITH DECISIONS OF THE FIRST, THIRD, SIXTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS, THE DISTRICT COURT FOR NEW JERSEY, AND ITS OWN PRECEDENT.

Petitioners also sued to enjoin the construction of the proposed extension because Respondents violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4331(c) (App. 20) and the Environmental Quality Improvement Act, 42 U.S.C. §4371(b)(1), (2) (App. 20). Rather than protecting and enhancing the environment by avoiding or minimizing damage, Respondents will in many ways maximize environmental damage (R. App. 4-9, 11-14). The United States Court of Appeals clearly erred in holding that because no federal money was involved Petitioners failed to state a cause of action (App. 5-6). In so ruling, the Court of Appeals violated the clear language of two Congressional enactments, ignored a long line of this Court's decisions on statutory inter-

pretation and legislative hisory, contravened its own precedent, lacked authority to support its decision, and conflicted with a decision of the United States District Court for New Jersey. This Court should be particularly interested in this decision and should take certiorari to examine it because the Court of Appeals used as its guideline a one-line comment made by one of the Justices of this Court in his dissent from a two-paragraph opinion denying certiorari, and the comment was not even remotely related to the subject-matter presently before this Court. This Court must ensure that this one-line excursion by one Justice of this Court does not mislead lower federal courts into believing that §4331(c) is now foreclosed to independent examination, thus predetermining for the nation the outcome of any future case based on this section. This Court now has the responsibility of examining the issue thoroughly, considering all the arguments, and making a definitive pronouncement.

The comment upon which the Court of Appeals relied was in Mr. Justice Douglas's dissent to the denial of Certiorari in *San Antonio Conservation Society* v. *Texas Highway Department,* 400 U.S. 968 (1970). That case concerned a federally funded highway which was to cut through a public park in San Antonio, Texas, and arose under a different provision of NEPA. In his dissent, Mr. Justice Douglas made the gratuitous personal observation that had the City of San Antonio or the State of Texas financed the highway with local funds, no federal question would be presented. Mr. Justice Douglas's quotation was as follows: "No federal question would, of course, be presented if Texas or San Antonio decided to turn these park lands into a biological desert." *Id.* at 978. Federal

funds, however, were involved in that case and it is clear that the issues raised in the case at bar were not raised, argued, elucidated or even before this Court for consideration. In passing, it should be noted that the Court of Appeals not only erred in regarding this comment as a guideline by this Court but erroneously considered a denial of Certiorari as an expression of approval by this Court of the lower court decision (App. 5).

It is important to note that although the Petitioners rested their claim under the National Environmental Policy Act (NEPA), 42 U.S.C. §4331(c) (App. 20), the Court of Appeals, although claiming to set out the pertinent parts of NEPA, in fact set out subsection (a) and the first part of sub-section (b) and completely ignored the main basis of Petitioners' claim, namely subsection (c) (App. 3). Similarly, the Court of Appeals relied on decisions of other circuits interpreting subsection (b) but not one decision cited by the court dealt with subsection (c) which is distinct in its wording and different in its thrust from (b).

The Court of Appeals relied upon two cases in addition to the dissenting opinion and the wrong section of NEPA. The first decision relied upon was *McQueary* v. *Laird*, 449 F. 2d 608 (10th Cir. 1971), concerning chemical and biological warfare agents stored in the Rocky Mountain Arsenal. The court in that case, however, never had the opportunity to consider the questions raised in this case for three reasons. First, the federal government was involved and sub-section (c) was therefore not even under consideration. Second, the court could not give much consideration to any part of NEPA because: "During oral argument the appellants for the first time indicated

that jurisdiction might vest by virtue of the National Environmental Policy Act of 1969." 3 E.R.C. 1184, 1185. Third and most important, the court's decision turned on a specialized and unique aspect of federal law regarding military disclosures: "In its proprietary military capacity, the Federal Government has traditionally exercised unfettered control with respect to internal management and operation of federal military establishments. . . ." *Id.* at 1187.

The second case relied upon by the Court of Appeals was *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 325 F. Supp. 749 (E.D. Ark. 1971). Again the federal government was involved and again the court never considered sub-section (c). At the time Congress established the national policy, in other sections of the Act, as controller of federal operations, it also established procedures for the federal government to bring it into compliance with the policy set forth in NEPA. The federal government did not fulfill its obligations as defined by Congress and the government was enjoined at Plaintiff's request.

NEPA begins with a statement of purpose, 42 U.S.C. §4321 (App. 18). In the next section it makes a "Congressional declaration of environmental policy", 42 U.S.C. §4331 (App. 18), which is divided into three parts. The first part is directed to state and local governments and public and private organizations; the second part is addressed to the federal government; and the third part is addressed to individuals, 42 U.S.C. §4331(a), (b), (c). This declaration of a national environmental policy follows a statement of purpose and was meant to effectuate that purpose. To deny meaning and effect to sub-sections

(a) and (c) is to violate the well settled and often repeated holding of this Court that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Ex Parte Public Bank*, 278 U.S. 101, 104 (1928); *U.S.* v. *Fisher*, 109 U.S. 143, 145 (1883); *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882). Congress enacted a statute, not a resolution, and put this section and its subsections squarely within Title I. The Court of Appeals therefore held that Congress enacted meaningless surplusage as one section of Title I, and that in the midst of drafting a statute, threw in a lengthy section never intending it to become law or to have effect.

It is a long standing rule of statutory construction that acts *in pari materia* should be consulted where there is doubt as to meaning. The Environmental Quality Improvement Act, 42 U.S.C. §4371, enacted only a short time after NEPA and declaring once again the same national policy for the environment, states unequivocally:

> (b)(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. * * *
>
> (2) The primary responsibility for implementing this policy rests with State and local governments. 42 U.S.C. §4371(b)(1)(2) (App. 20).

If there was any question whether sub-section (a) of NEPA put a duty on state and local government, that doubt is completely removed by the Environmental Quality Improvement Act.

This Court has often held that a statute should be given effect according to its literal language. *Van Camp & Sons* v. *American Can Co.*, 278 U.S. 245, 253 (1928);

accord: *Hilliard* v. *U.S.*, 310 F. 2d 631, 632 (6th Cir. 1962). Sub-section (c) provides:

> (c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. 42 U.S.C. §4331(c) (App. 20).

The word "should" has repeatedly been interpreted and defined as a word of command. "Should" is mandatory. *Town of Edgewater* v. *Liebhardt*, 32 Colo. 307, 76 P. 366 (1904); *Fegan* v. *Lykes Bros. S.S. Co.*, 198 La. 312, 3 So. 2d 632 (1941); *State* v. *Bruton*, 383 S.W. 2d 525 (Mo. Sup. Ct. 1964); *Williams* v. *Kaestner*, 332 S.W. 2d 21, 27 (Mo. Ct. App. 1960). Furthermore, Congress not only recognized the right, it also spelled out its corollary, its corresponding duty. The word "responsibility" is defined by the Seventh Circuit as well as other courts as meaning "obligation" or "duty". *Niagara Fire Extinguisher Co.* v. *Hibbard*, 179 Fed. 844, 848 (7th Cir. 1910); *The Mary Barrett*, 279 Fed. 329, 334 (3rd Cir. 1922); *Murphy* v. *Chicago League Ball Club*, 221 Ill. App. 120, 126-7 (1921); *Bouvier's Law Dictionary Unabridged* (8th ed.). These words must be taken as meaning in the statute what they are commonly understood to mean. *Henry* v. *U.S.*, 251 U.S. 393, 395 (1919) (Justice Holmes speaking for the Court); *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882). The Seventh Circuit, however, neither read nor enforced this sub-section of the Act according to its plain language, but sought to nullify the words and thus contravened other decisions of this Court. *Carter's Heirs* v. *Cutting & Wife*, 12 U.S. (8 Cran.) 251, 252 (1814); *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1928).

The Court of Appeals further disregarded the statute's history which clearly demonstrates that Congress intended to create a right. The report of the Senate Conference Committee reporting the final draft of the legislation to the floor of the Senate leaves no question that a right was intended:

> Section 101(c).
>
> This subsection asserts congressional recognition that each person should enjoy a healthful environment. It is apparent that the guarantee of the continued enjoyment of any individual right is dependent upon individual health and safety. It is further apparent that deprivation of an individual's healthful environment will result in the deprivation of all of his rights.
>
> The subsection also asserts congressional recognition of each individual's responsibility to contribute to the preservation and enhancement of the environment. The enjoyment of individual rights requires respect and protection of the rights of others. The cumulative influence of each individual upon the environment is of such great significance that every effort to preserve environmental quality must depend upon the strong support and participation of the public. Cong. Rec., December 20, 1969, p. 40419.

It also disregarded the statutory history of the Environmental Quality Improvement Act, 42 U.S.C. §4371 (App. 20) which is a complementary act *in para materia* declaring once again the same national policy for the environment. In its committee report the Senate Committee for Interior and Insular Affairs, under the heading "Title II, Environmental Quality Summary and Discussion of Major Provisions" referring to §4371(b) (1) and (2), stated:

> The States have been delegated the primary responsibility to protect and enhance the quality of air and water within their boundaries, and, in cooperation with other States, to protect and enhance the quality or air and water within resource areas common to those States. Senate Report 91-351, 91st Cong., 1st Sess. 37 (1969).

The Court erred in disregarding these clear indications of legislative intent.

The Court of Appeals violated the precedent and authority of this Court in not enforcing this statute as law. First, it violated all the well established rules of statutory interpretation. Second, it never analyzed the Act nor so much as mentioned the canons of interpretation commanded by this Court. Third, it nullified an Act of Congress by refusing to enforce the duties established therein or the policy which Congress declared for the nation. The Seventh Circuit cannot nullify the policy established by the policy-making branch of the federal government. It is bound to enforce that policy as any other law. *Moragne* v. *States Marine Lines,* 398 U.S. 375, 390-1 (1970); *Van Beeck* v. *Sabine Towing Co. Inc.,* 300 U.S. 342, 351 (1937) (Justice Cardozo speaking for the Court); *Johnson* v. *U.S.,* 163 Fed. 30, 32 (1st Cir. 1908) (Justice Holmes speaking for the Court); *Tag* v. *Rogers,* 267 F. 2d 664, 668 (D.C. Cir. 1959). The Congress realized that setting policy on environmental matters merely for the federal government would accomplish little if state and local governments as well as individuals were free to disregard it. Congress bound the nation by declaring a national policy which put obligations on all levels and parts of society.

The United States District Court for New Jersey recognized that the policy enunciated by Congress was a mandate to be enforced against all who violate it. In *Izaac Walton League* v. *Macchia*, 2 E.R.C. 1661 (D.N.J. 1971), the court recognized that NEPA extended beyond the federal government, and applied it to state officers who permitted a dredge and fill operation which endangered the environment. The court also recognized that NEPA applied to and was binding on the private individuals actually performing the dredge and fill operation as part of their private building development. In granting an injunction against the private developers working on their own private building venture for their own profit, the court held, "Our environment must be protected against abuse, *either public or private*. That is the mandate of Congress." *Id.* at 1669.

Respondents herein, whether as persons or the Illinois State Toll Highway Authority, breached their statutory duty and Petitioner's rights by not weighing or considering the environment to avert damage thereto.

That environmental damage would be caused by the proposed project in a unique area cannot be questioned. The area has some of the richest soil in the nation in combination with a climate well suited to agriculture and the most stable in the nation, and a high water table (R. App. 4). Because of the high water table the area is resistant to drought (R. App. 11) but without the aid of drainage tiles and the natural run-off patterns there would be erosion and the land would become untillable marsh (R. App. 4, 6) where mosquitoes and other pests would breed (R. App. 10). Respondents under NEPA have an obligation to protect and enhance Petitioners'

environment. However, the Respondents have taken no care to preserve the present drainage system. Although they commissioned an engineering report, they considered no drainage except for water which falls on the pavement to be shunted to the surrounding land, and as Petitioners alleged below, "said Defendants have not made and have no intention of making exploratory surveys to locate and preserve the crucial water drainage tiles and no drainage system is planned for the tollway to prevent the disruption by the Tollway of existing run-off patterns" (R. App. 6).

Air pollution, detrimental to the health of humans and animals and which will reduce the quality and quantity of crop yields will be caused as a natural result of the proposed extension (R. App. 4, 5, 7, 12). Petitioners alleged in the Complaint below:

> 16. The said report on traffic and revenue candidly sets forth the conclusions that most of the long distance traffic that would have been served by this proposed extension of the East-West Tollway is now served by the recently constructed Interstate 80, which is a new free limited-access multi-lane interstate highway, and that the traffic which can be expected to use the said proposed extension will be short distance local commuter traffic *and traffic which the construction of the highway will itself create and generate.* (Emphasis Added)

This is an extremely important allegation because it not only sets forth that the extension itself is unnecessary, as shown by the Authority's own traffic and revenue report, but that much of the pollution will be created by

the construction of the extension. Most of the anticipated traffic would not exist on any highway at any time but for the construction of the extension; this traffic is officially called "generated traffic." The emissions from the large amount of generated traffic are not only needless but also detrimental to the environment (R. App. 4). Furthermore, the construction of this unnecessary tollway is expected and planned to stimulate industrial development along the route, which in turn is expected to create more traffic for the toll highway extension (R. App. 7). The emissions from both the industrial sources and the traffic is unnecessary and degrading to the environment.

Furthermore, not only are large numbers of acres in danger of becoming untillable marsh because of drainage disruption, but the planned route of the road will maximize the number of acres taken out of production because the route is not a straight route paralleling section lines, but is a diagonal curve (trapezoidal route) using 2,565 acres for the extension, isolating 1,102 acres and severing 3,361 acres (R. App. 7). In addition the Respondents are depending on industrial development along the extension, stimulated by the extension (R. App. 7). The diagonal route will require more acreage for the extension itself and cause more isolation (R. App. 7). Many local roads will be closed, limiting access to various social and emergency services (R. App. 13).

The Respondents are destroying the environment and ecology of the area in violation of Petitioners' rights and their obligations under NEPA and under the Environmental Quality Improvement Act, and should be enjoined until they can prove that the social cost is less than the social gain and that they have taken care to minimize

environmental and ecological degradation and destruction. *Steele* v. *L. & N.R. Co.*, 323 U.S. 192, 207 (1944).

The importance of this issue for the nation as a whole is overwhelming. Our environment is in danger of being exhausted irreparably. Congress recognized this and sought to protect and enhance the environment by putting obligations on all levels of society—federal, state and local governments, and individuals. Congress was mindful that in order to preserve natural resources the obligation to do so must be on all, since it is state and local actions as well as individual actions which have the greatest impact on the environment. The Courts must enforce the express language of Congress and the obligations and rights therein set forth. The Seventh Circuit Court of Appeals failed to enforce an Act of Congress against the clear intent and meaning of the words, against the demonstrated legislative history, against the authority of this Court, and the conflict with other Circuit and District courts. This court should hear this case and clarify for the lower federal courts whether the gratuitous statement of Justice Douglas is the holding of this Court. This Court must vindicate its past decisions and its authority over the Circuit Courts, resolve the conflict of the Seventh Circuit with the other Circuit and District courts, and clarify and define this Court's position on the issue so that lower federal courts will not be led astray.

CONCLUSION.

In view of the foregoing, we respectfully submit that the Court of Appeals opinion below is in conflict with the rulings of this Court, other Circuit Courts, Federal Statutes and Constitutional provisions on important questions of federal law; that the recently recognized federal environmental rights and duties involved herein need further definition and clarification by this Court; that the effect of the decision is to cause confusion and uncertainty in the law with the resulting loss of substantial justice to citizens of the United States and will increase rather than decrease litigation in the United States courts of review unless the supervision and correcting authority of this Court is brought into use by granting the Writ of Certiorari.

Petitioners pray that the Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be allowed in this case and that on such review by this Court the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 71-1488
BRADFORD TOWNSHIP, et al.,
Plaintiffs-Appellants,
v.
ILLINOIS STATE TOLL HIGHWAY AUTHORITY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71-C-1270
FRANK J. McGARR, *Judge.*

ARGUED APRIL 20, 1972 — DECIDED JUNE 22, 1972

Before SWYGERT, *Chief Judge*, PELL, *Circuit Judge*, and JUERGENS*, *District Judge.*

JUERGENS, *District Judge.* This is an appeal from an order of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing plaintiffs' complaint for failure to state a cause of action.

* Chief District Judge William G. Juergens of the Eastern District of Illinois is sitting by designation.

This action is to enjoin the defendants, the Illinois State Toll Highway Authority, from constructing the proposed extension to the East-West Toll Highway from Aurora, Illinois, to Rock Falls, Illinois.

Plaintiffs allege that the extension of the highway will greatly damage the environment in that it will cause the closing of many roads and limit access to various social and emergency services, cause pollution of the air by virtue of gas exhaustion, disruption of vital water drainage systems and patterns, and will destroy important acreage along the route it traverses, which land is exceptionally prolific farm property, very high in quality for farming purposes because of its fertility and its drought resistance.

It is alleged that the lands were previously swamp lands, which have been drained through the use of tile, and that the proposed construction of the tollway makes no provision for maintaining the drainage facilities.

Jurisdiction is alleged to exist under the provisions of the National Environmental Policy Act, 42 U.S.C. § 4321 and § 4331; the Environmental Quality Improvement Act, 42 U.S.C. § 4371; Meeting of Public Agencies Act, Chapter 102 Ill. Rev. Stat. § 42; the Civil Rights Act, Title 42 U.S.C. § 1983.

Section 4321 declares the purpose by stating:

> "Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

Section 4331 is in pertinent parts as follows:

"(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

"(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of nation policy, to improve and coordinate Federal plans, functions, programs, and resources * * *."

The Environmental Quality Improvement Act, 42 U.S.C. § 4371. provides:

"§ 4371. Congressional findings, declarations, and purposes.

(a) The Congress finds—

(1) that man has caused changes in the environment;

(2) that many of these changes may affect the relationship between man and his environment; and

(3) that population increases and urban concentration contribute directly to pollution and degradation of our environment.

(b)(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. • • •

(2) The primary responsibility for implementing this policy rests with State and local governments."

Plaintiffs-appellants argue that the district court dismissed the cause for lack of jurisdiction without any consideration of the various federal claims alleged. The district court's opinion elicits that it took jurisdiction because a federal cause of action was alleged in the complaint. The court, after considering the claims alleged, dismissed the complaint for lack of jurisdiction over the subject matter.

The question of whether or not the National Environmental Policy Act (NEPA) creates a substantive right was dealt with in *Environmental Defense Fund* v. *Corps of Engineers of the United States Army*, 325 F.Supp. 749, which held that NEPA was merely a statement of policy and created no substantive rights giving a right to the enjoining of a dam project in that area. The court further held that the plaintiffs were relegated to the procedural requirements under § 102 of NEPA which required the governmental agency to file a "detailed impact" statement.

In *McQueary* v. *Laird*, 449 F.2d 608 (10 Cir. 1971), various residents of Colorado sought to enjoin the storing of chemicals and biological warfare agents at Rocky Mountain Arsenal. The court held NEPA does not create substantive rights in the plaintiffs to raise the environmental challenge in the Rocky Mountain Arsenal.

Federal agencies are clearly charged with certain procedural requirements under NEPA and failure to comply

therewith is basis for an injunction. One of the requirements is that an impact statement must be filed showing the impact on the environment by virtue of the proposed agency action.

Judicial relief is available to correct failure on the part of a federal agency to follow the procedural requirement under NEPA.

A question somewhat comparable to that presented here was presented to the Supreme Court in *San Antonio Conservation Society of Texas* v. *Texas Highway Department*, 91 S.Ct. 368, 400 U.S. 968. This case involved the construction of a federally funded highway through a San Antonio, Texas park. The court originally granted a stay, later dissolved the stay and denied certiorari. Justice Douglas dissented, arguing that major federal action was involved and federal jurisdiction existed because an environmental impact statement had not been prepared by the U. S. Department of Transportation. Thus, in the factual situation presented here, it would appear that even Justice Douglas would hold that the Act is not applicable, since we are here dealing with independent state or local governmental actions.

The Environmental Quality Improvement Act (EQIA), 42 U.S.C. § 4371, is clearly limited in its application to agencies of the federal government. The Act provides, inter alia, that each federal department and agency conducting or supporting public work activities, which affect the environment, shall implement the policies established under existing law. The Act authorized an Office of Environmental Quality which was to provide provisional and administrative staff for the Counsel on Environmental Quality. Nowhere does the Act purport to give a cause of action against state agencies or officers as plaintiffs contend.

There is no claim that the federal government or any federal agency is engaged in any manner in the construc-

tion of the tollway extension. Nor is it alleged that any federal funds are to be used. Since the procedural requirements of the National Environmental Policy Act are applicable only to federal agencies, it is patently clear that these requirements have no pertinence to the facts of this case. Other than the procedural requirements just mentioned, no judicially enforceable duties are created by either the National Environmental Policy Act or the Environmental Quality Improvement Act. The declarations of a national environmental policy and a statement of purpose appearing in these acts are not sufficient to establish substantive rights. For these reasons, the plaintiffs have asserted no cognizable federal rights under these statutes.

Plaintiffs-appellants allege that no public hearings were held as required by the Illinois Meetings of Public Agencies Act. Suffice it to say that this is a state statute and, if valid, might provide a cause of action in the state courts. It does not give rise to a cause of action cognizable by a federal court, nor does a failure to follow the requirements of the Act constitute a violation of a federally protected constitutional right. See *Green Street Association* v. *Daley*, 373 F.2d 1 (1967).

The allegations of the complaint are totally insufficient to state a cause of action under the Civil Rights Act.

The District Court properly dismissed the complaint for failure to state a claim upon which relief could be granted.

The order of the District Court, dismissing the complaint, is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

OPINION BY JUDGE JUERGENS

In the

United States Court of Appeals

For the Seventh Circuit

June 22, 1972

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM G. JUERGENS, *Chief District Judge*

Cause No. 71-1488

BRADFORD TOWNSHIP, *et al.*,

Plaintiffs-Appellants,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, *et al.*,

Defendants-Appellees.

This cause came on to be heard upon the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court dismissing the complaint in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. Appellants' appendix filed November 1, 1971.
2. Opinion Filed June 22, 1972.
3. Judgment Entered June 22, 1972.

Cause No. 71-1488

BRADFORD TOWNSHIP, *et al.*,

Plaintiffs-Appellants,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, *et al.*,

Defendants-Appellees.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 15th day of September A. D. 1972.

/s/ William H. Pittman
Deputy Clerk of the United Court of Appeals for the Seventh Circuit

APPENDIX D

1 EXCERPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, June 25, 1971, at 2:00 o'clock p.m.

Present:

Mr. David Lincoln Ader
(175 East Delaware Place, Suite 5407, Chicago, Illinois)
appeared on behalf of plaintiffs;

William J. Scott,
Attorney General, State of Illinois
(160 North LaSalle Street, Chicago, Illinois) by
Mr. John Lavery and
Mr. Walter K. Pyle,
Assistant Attorneys General, and
Mr. Frank S. Righeimer, Jr.,
Special Assistant Attorney General,
appeared on behalf of defendants.

• • • • •

2 The Court: Gentlemen, I have had the opportunity to read these briefs, which I might say are thorough and well done. Counsel's leave granted to amend them slightly has not in any way caused me to re-read them, because it was the correction of minor errors that didn't cause me any inconvenience in the first place. And I have listened to an excellent argu-

ment on both sides, and because I have had this opportunity to read the briefs and to do some research of my own, and read some of your cases, despite the importance of the question, I think I am prepared to rule at this time.

First, to be absolutely clear as to the posture of the matter before me, I do not, and have not refused jurisdiction in this case. Your presence here today arguing, I am sure, establishes that. But having taken jurisdiction because a federal cause of action has been alleged in the complaint, I have before me now a motion to dismiss, principally on the ground, to state it in summary form, that the complaint fails to state a claim upon which the Court can grant relief and the Court lacks jurisdiction over the subject matter.

First, some general comments that are suggested
3 to me by the argument made. Counsel, Mr. Ader, very ably argued and raised the question, "What is progress?" Not all building, and splashing of concrete around the countryside, is necessarily progress, and of course, more particularly whether a toll road extension, in this case, is or is not progress is debatable. And whether it should or should not be built, I am sure is subject to a lot of pros and cons, and to a genuine difference of opinion on the part of a lot of well-intentioned people. But I don't have to get to that. The issue here is whether this court is the proper forum for that debate, and that is the only issue that I address myself to.

Absent two issues, that is, the Federal Environmental Protection legislation, and the open meeting issue, there would otherwise than those issues, not be

the slightest basis for Federal Court intervention into a toll road extension, which is a purely State concern. Absent the allegations of those two issues, I think I would have dismissed this case on my own motion after a reading of the complaint, and I focus, therefore, on those two issues as the only real reason why I have any genuine concern as to whether we have a cause of action here that should or should not be dismissed.

Absent those two issues again, and looking at this case from the traditional point of view, I think we start with the assumption that Illinois has an inherent sovereign power to condemn, and in the traditional view, the damages done thereby are compensable in the State Courts. And in the traditional view of condemnation for the building of roads or any other sovereign function, no irreparable injury is shown from the exercise of this power because of the ability to utilize the State Courts to obtain recompense for the taking. But as I said, we have two issues in the case that raise, at least the specter of constitutional issues, and they have to be carefully considered.

Turning to the first of these, the open meetings issue, the complaint is somewhat vague on the violation, or the alleged violation of the Illinois statute. It states, as I recall, that there were four secret meetings. I have an indication from somewhere in the record, whether an argument made when the case was up earlier, or made today, or contained somewhere in the briefs—that there were some public meetings concerning the construction of the toll road, and the route it would take, or the area through which it

would go. But on reflection I don't believe that I would really have to get into that in the context of this motion.

The allegation that the Illinois Open Meetings Act was not complied with, does not rise to the dignity of a due process allegation sufficient to undergird Federal jurisdiction to enjoin the State in the exercise of a vital and uniquely local function. I know of no case indicating—and I have had none called to my attention—indicating that public hearings on highway construction proposals are a requirement dictated by constitutional due process. In addition, referring to your argument, Mr. Ader, it is easy, it is appealing, and sensible to say, that individuals have a property right in the environment which invokes due process every time the environment is disturbed, even by the sovereign. But I don't find that the Constitution says that, nor do I find that Congress in the Acts which you have called to my attention has said so. And if Congress ever does precisely say so in some way other than the broad statements of policy that I now have before me, Congress had also better say that they are appropriating enough money to build another courthouse and appoint 25 new judges, since we will be creating almost a universally applicable individual Federal cause of action. So the due process argument does not create, in my mind, the basis for Federal jurisdiction here.

A much more serious concern, however, is the environmental legislation, which you called to my attention. And it is your view, and you very ably argued it, that this environmental legislation has created a new right in individuals which has the stature of a

civil or constitutional right, and is therefore cognizable in the Federal Courts as civil and constitutional rights are, by virtue of the Constitution or other Federal legislation.

As I read, however, the Environmental Protection Act, if that is the correct name of it; the various pieces of environmental legislation that you have referred me to, I see Congress expressing its very real environmental concerns by appropriating some money and creating an agency and expressing a policy. And this policy seems to be that Congress is committing the Federal Government, and directing all of its executive branches to a recognition in furtherance of the policy expressed, that is, the preservation and conservation of the environment, and is directing all Federal executive agencies to cooperate with the State Government, and is directing all individuals to attend to their appropriate concerns and responsibilities in this matter. But it never ceases to be a statement of policy. And this is not enough to create Federal jurisdiction. The statutes concerned must reveal a Congressional intent to create, not a policy, but a right, and a remedy, and more, a remedy the enforcement of which is clearly entrusted to the Federal Court. The environmental legislation relied upon in support of Federal jurisdiction here does not charge the Federal Courts precisely, or directly with responsibility for generally policing the States to prevent environmental damage, and it does not, as I read it, create rights in individuals to invoke Federal jurisdiction, nor does it empower the Federal Courts to fashion remedies to prevent environmental damage.

With that view of the statutes, I have to, once again, consider the extraordinary nature of the relief you are seeking here. There is a traditional reluctance on the part of the Federal authority to intervene in
8 the affairs of a State. I am being asked here to enjoin a State agency from extending a toll road. As I said, an extraordinary relief. The State of Illinois, in the person of its Legislature and the Governor and the appropriate agencies, have given consideration, I am sure, under their responsibility of office, to the needs of the citizenry of the State, and have balanced the good against the bad in this matter and decided, apparently, to extend the toll road. I am being asked to substitute my judgment for theirs in a matter which I think is uniquely a local concern, without even an allegation, as I gather the facts to be, of Federal funds in this construction.

I do not believe that I have been shown the jurisdictional authority to do what you have asked me to do. I want to commend you, Mr. Ader, on your excellent and most lawyer-like job of skillfully constructing an aura of Federal right from what I regard as the most meager Congressional indications. I have a great deal of sympathy for your environmental concerns. Despite that, however, I haven't been convinced, and the motion of the several defendants to dismiss is granted.

9 I think that is all we need to do today, gentlemen.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

10 Certificate of Court Reporter.

APPENDIX E

Title 28, United States Code, Judiciary and Judicial Procedure.

Vol. 7, p. 7431, Ch. 3—Courts of Appeals

§ 46. *Assignment of judges; divisions; hearings; quorum.*

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum. (June 25, 1948, ch. 646, 62 Stat. 871; Nov. 13, 1963, Pub. L. 88-176, § 1(b), 77 Stat. 331.)

Vol. 7, p. 7562, Ch. 83—Courts of Appeals

§ 1291. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

Vol. 7, p. 7560, Ch. 81—Supreme Court

Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Vol. 7, p. 7636, Ch. 133—Review—Miscellaneous Provisions

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Vol. 7, p. 7702, Rule 4—Appeal as of Right—When Taken

(a) *Appeals in Civil Cases.*

In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of

appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Vol. 7, p. 7566, Ch. 85—§1331(a)—Federal Question Jurisdiction

The districts courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States.

Vol. 7, p. 7571, Ch. 85—§1343(4)—Civil Rights Jurisdiction

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, . . .

Vol. 9, p. 10657, Ch. 55—National Environmental Act, 42 U.S.C. §4321

Congressional declaration of purpose.

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; . . .

Title 42, United States Code, Public Health and Welfare Vol. 9, p. 10665, Ch. 55, Sub-Ch. I—§4331(a)(b)(c)

§ 4331. Congressional declaration of national environmental policy.

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and

local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of

living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Vol. 9, p. 10669, Ch. 56—§4371 (b)(1)(2)

(b)(1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. • • •

(2) The primary responsibility for implementing this policy rests with State and local governments.

Title 42, United States Code, Public Health and Welfare
Vol. 9, p. 10283, Ch. 21, Sub-Ch. I—§1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fourteenth Amendment, United States Constitution, §1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Article XI, Illinois State Constitution of 1970

Section 2. Rights of Individuals

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law. [The second sentence of Section 2 of Article XI shall become effective on January 1, 1972. See Transition Schedule Section 1(d).]

Ch. 102, Illinois Revised Statutes—Officers

Vol. 2, p. 1558, ch. 102—§42—Meetings of Public Agencies

42. All official meetings open to the public—Exceptions.]

§ 2. All meetings of any legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, shall be public meetings except for (a) personnel or collective negotiating matters between public employers and their employees or representatives as to employment, (b) deliberations for decisions of the Illinois Commerce Commission, the Illinois Parole and Pardon Board and the Illinois Youth Commission or its successor agency, (c) executive sessions of the Illinois Crime Investigating Commission where investi-

gations are to be discussed, (d) meetings where the acquisition of real property is being considered, or where a pending court proceeding against or on behalf of the particular governmental unit is being considered, but no other portion of such meetings may be closed to the public, (e) grand and petit jury sessions and (f) where the constitution provides that a governmental unit can hold secret meetings. This Act does not apply to the General Assembly or to committees or commissions thereof.

This Section does not prevent any body covered by this Act from holding closed sessions to consider information regarding appointment, employment or dismissal of an employee or officer, but no final action may be taken at a closed session. This Section does not prevent an agency of government from holding a closed session when Federal regulation requires it. This Section does not prevent a school board or any committee thereof from hearing student disciplinary cases or from discussing matters relating to individual students in special education programs as defined in Article 14 of The School Code at a closed session. This Section does not prevent an advisory committee appointed to provide a public body with professional consultation on matters germane to its field of competence from holding a closed session to consider matters of professional ethics or performance.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-469

BRADFORD TOWNSHIP, et al.,

Petitioners,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATUTES INVOLVED

The National Environmental Policy Act of 1969, 42 U.S.C., §4321 et seq., and the Environmental Quality Improvement Act of 1970, 42 U.S.C., §4371 et seq., are statutes involved in this case, which are not fully set forth in the Appendix to the Petition for Writ of Certiorari and are set forth in full in the Appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Whether there are any special and important reasons for granting a petition for writ of certiorari to review the decision of the Court of Appeals.

2. Whether the Court of Appeals was correct in holding that an alleged violation of the Illinois Meetings of Public Agencies Act did not state a claim under the Due Process Clause of the United States Constitution.

3. Whether the Court of Appeals was correct in holding that the National Environmental Policy Act of 1969 and the Environmental Quality Improvement Act of 1970 did not establish substantive environmental rights upon which these petitioners can state federal claims.

STATEMENT OF THE CASE

The petition for writ of certiorari seeks to review the judgment of the United States Court of Appeals for the Seventh Circuit which affirmed the order of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint for failure to state a claim upon which relief could be granted by a federal court.

This action was brought by alleged residents of certain Illinois counties to permanently enjoin the construction of a completely state-funded extension to an Illinois Tollway. The petitioners are various Illinois Townships through which a proposed extension of the Illinois East-West Tollway will allegedly be built, various alleged residents of the "area" through which said extension will allegedly be built and an unincorporated association known as the Northern Counties Social Action Council.

No federal officials or federal agencies are petitioners (App. 1, 2).

The respondents in this case are the Governor of the State of Illinois and the Director of the Department of Public Works and Buildings of the State of Illinois (sued as "ex officio members of the Illinois State Toll Highway Authority"), the Executive Administrator of the Illinois State Toll Highway Authority, and the members of the Illinois State Toll Highway Authority. No federal officials or federal agencies are respondents (App. 2).

The complaint alleges that the Illinois State Toll Highway Authority is in the process of acquiring land for the construction of an extension to the Illinois East-West Tollway; that the said tollway extension will have a detrimental effect on the environment of the area through which it passes; and that the respondents have not taken environmental factors into consideration in planning the said highway extension allegedly in violation of various laws of the United States and of the United States Constitution. The allegations as to the detrimental environmental effect are general and would apply to the construction of any highway anywhere: farm land will be taken on which to build the tollroad; cars and trucks with gasoline engines will use the tollroad; the tollroad will introduce far more industry into the area and this, in turn, will introduce chemical pollutants into the atmosphere; and the tollroad "will irretrievably stimulate the further sprawl of urban concentration with its attendant pollution." Nowhere in the complaint is it alleged that the federal government, federal funds or any federal agency or federal official is in any way involved with any of the matters alleged therein (App. 1-14).

Federal jurisdiction is purported to exist by virtue of recent Congressional enactments establishing environ-

mental policy which respondents contend are procedural in nature and applicable only to federal projects, and the alleged failure of the respondents to comply with an Illinois statute relating to public hearings which allegedly deprived the petitioners of due process of law. Although respondents contend that public hearings were in fact held,[1] the respondents have in connection with their motion to dismiss treated the allegation of no hearings held as correctly stating the facts and contend that such hearings were not required and that a lack of such hearings in any case would not violate due process. (App. 3, 8 and 9).

SUMMARY OF ARGUMENT

I. This case does not merit review by writ of certiorari.

(a) Review by certiorari is not a matter of right and there are no special or important reasons for granting such a review in this case. 28 U.S.C. §1254; Rule 19 of Supreme Court Rules, 28 U.S.C.

(b) The issues present in this case have uniformly been decided adversely to the petitioners' position in numerous cases and there is no conflict in the courts as to the effect of the laws involved. (See Argument under II and III).

II. The Court of Appeals correctly ruled that alleged violations of the Illinois Meetings of Public Agencies

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1. Such was the holding of the Circuit Court of Lee County, Illinois in a condemnation proceeding wherein the same counsel of record for petitioners herein contested respondent's right to take certain property for the highway in question. Illinois State Toll Highway Authority v. Karn, No. 71-6L-220 (Appeal pending before Appellate Court of Illinois, Second District, No. 71-248).

Act, Chap. 102, Ill. Rev. Stat., §42 et seq., do not state a federal cause of action.

(a) The meetings involved in this case involved the acquisition of property by eminent domain and were specifically exempt from the provisions of the Illinois Act. Chap. 102, Ill. Rev. Stat., §42 (d).

(b) The courts have uniformly held that the failure to hold a public hearing before instituting state condemnation proceedings, whether or not such a hearing is required by statute, does not constitute a deprivation of federal due process. *Rindge Co.* v. *Los Angeles County*, 262 U.S. 700 (1923); *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967), *cert. denied* 387 U.S. 932; *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Fin. Agency*, 310 F. 2d 99 (7th Cir. 1962), *cert. denied* 373 U.S. 914; *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill., 1955), *affirmed* 349 U.S. 942 (1955).

(c) The environmental rights which petitioners alleged were infringed upon without due process, are not recognized legal rights entitled to the protection of due process (See Argument).

III. The Court of Appeals correctly ruled that the National Environmental Policy Act of 1969 and the Environmental Quality Improvement Act of 1970 are applicable only the federal agencies and create no substantive rights.

(a) The National Environmental Policy Act of 1969, 42 U.S.C. §4321, et seq. (NEPA) establishes the Council on Environmental Quality and sets up certain procedural requirements

for federal agencies aimed at requiring those agencies to take environmental factors into consideration in planning federal projects and providing Congress with the necessary facts upon which to base environmental legislation. NEPA has no application to the state-funded tollway project involved in this case since it applies only to state projects or state agencies and creates no substantive environmental rights. *Civic Improvement Committee* v. *Volpe*, 459 F. 2d 957 (4th Cir. 1972); *City of Boston* v. *Volpe*, —— F. 2d —— (C.A. 1, 1972) [4ERC 1337]; *Eli* v. *Velde*, 451 F. 2d 1130 (4th Cir. 1971); *Miltenberger* v. *Chesapeake and Ohio Railway Co.*, 450 F. 2d 971 (4th Cir. 1971); *McQueary* v. *Laird*, 449 F. 2d 608 (10th Cir. 1971); *Environmental Defense Fund* v. *Corps. of Engineers of the U.S. Army, et al.*, 325 F. Supp. 749 (E.D. Ark. 1971); *San Francisco Tomorrow* v. *Romney*, 342 F. Supp. 77 (N.D. Calif. 1972); *Tanner* v. *Armco Steel*, 3 E.R.C. 1968 (So. Dist. of Texas 1972); *Bucklein* v. *Volpe*, 2 E.R.C. 1082 (N.D. of Calif. 1970).

(b) The Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371, et seq. established the Office of Environmental Quality to provide the professional and administrative staff for the Council on Environmental Quality and insure that federal agencies are implementing the procedural dictates of NEPA. This Act has no application to the state-funded tollway project involved in this case since it applies only to state projects and creates no substantive environmental rights. (See Argument).

ARGUMENT

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS.

A review on writ of certiorari is not a matter of right and is granted only where there are special or important reasons therefor. 28 U.S.C. §1254; Rule 19 of Supreme Court Rules, 28 U.S.C. The situations which would merit review by certiorari, as set out in the Supreme Court Rules, are not present in the instant case: The decision of the Court of Appeals is not in conflict with the decisions of any other court, including the Supreme Court; there are no important questions of federal law decided by the Court of Appeals which need to be settled by this court; and there are no matters present in this case which require the exercise of the court's supervision. Rule 19 of Supreme Court Rules, 28 U.S.C.

As will appear more fully in the sections that follow, the issues present in this case have uniformly been decided adversely to the petitioners' position in numerous cases and there is no conflict in the courts as to the effect of the laws involved. The petitioners make no attempt in their petition to point out any special or important reasons for granting review by certiorari and their silence in this regard attests to the fact that no appropriate reason for granting certiorari is present in this case.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT ALLEGED VIOLATIONS OF THE ILLINOIS MEETINGS OF PUBLIC AGENCIES ACT DO NOT GIVE RISE TO A CAUSE OF ACTION COGNIZABLE BY A FEDERAL COURT NOR CONSTITUTE A VIOLATION OF A FEDERALLY PROTECTED CONSTITUTIONAL RIGHT.

The Court of Appeals was correct in its holding that alleged violations of the Illinois Meetings of Public Agencies Act do not constitute a proper federal claim. The court stated:

> "Plaintiffs-appellants allege that no public hearings were held as required by the Illinois Meetings of Public Agencies Act. Suffice it to say that this is a state statute and, if valid, might provide a cause of action in the state courts. It does not give rise to a cause of action cognizable by a federal court, nor does a failure to follow the requirements of the Act constitute a violation of a federally protected constitutional right." (Appendix to Petition, 6A).

The allegations pleaded by the petitioners in their complaint, which was dismissed for failure to state a federal claim, were insufficient to even allege a breach of the Illinois Meetings of Public Agencies Act, Chapt. 102, Ill. Rev. Stats. 1971, §42 et seq. The meetings in question concerned the acquisition of real property and were specifically exempt from the provisions of the Act. Chap. 102, Ill. Rev. Stats. 1971, §42(d). Moreover, the specific exemption of such meetings from the requirements of the Act, makes it clear that the Illinois legislature did not intend by this Act to thereby place limitations on the State's power of eminent domain.

Even if the petitioners' allegations could be construed as alleging a breach of Illinois law with regard to public hearings, such a breach might entitle them to a remedy in the Illinois courts—but it would not be the basis of a federal claim arising under the Constitution or laws of the United States. The right to a public hearing exists only by virtue of State law and the failure to provide such a hearirg does not constitute a deprivation of federal due process. *Rindge* v. *Los Angeles County*, 262 U.S. 700 (1923); *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967), *cert. denied* 387 U.S. 932; *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency*, 310 F. 2d 99 (7th Cir. 1962), *cert. denied* 373 U.S. 914; *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill. 1955), *affirmed* 349 U.S. 942 (1955).

The alleged environmental rights which petitioners contend they were deprived of without due process as a result of the alleged failure to hold public meetings are not legal rights entitled to the protection of due process.

(a)

THE MEETINGS OF THE ILLINOIS TOLLROAD AUTHORITY BY THEIR VERY NATURE CONCERNED THE ACQUISITION OF REAL PROPERTY FOR THE PUBLIC USE IN EXTENDING THE EAST-WEST TOLLWAY AND WERE THEREFORE EXEMPT FROM THE PROVISIONS OF THE ILLINOIS MEETINGS OF PUBLIC AGENCIES ACT.

Section 42 of the Meetings of Public Agencies Act, Chapter 102 Ill. Rev. Stat., §42, in pertinent part, states as follows:

> "All official meetings open to the public—Exceptions. All meetings . . . shall be public meetings except for . . .
>
> (d) meetings where the acquisition of real property is being considered, or where a pending court proceeding against or on behalf of the particular governmental unit is being considered, but no other portion of such meetings may be closed to the public . . ."

It is obvious that all meetings to consider the extension of a tollroad would certainly by their very nature be meetings where both the acquisition of the real property on which to build the extension and the institution of eminent domain proceedings will be considered. Any such meetings would be exempt from the provisions of the Illinois Meetings of Public Agencies Act. Therefore, since the pertinent meetings would be exempt from the provisions of the Act, the complaint fails to state a claim even under Illinois law. This appears from the face of the complaint itself and is a proper ground for dismissal for failure to state a claim.

The petitioners contend that the Illinois Meetings of Public Agencies Act constitutes a limitation by the State on its power of eminent domain and the failure to comply with this limitation would be a violation of due process. It is apparent from the fact that the Act specifically exempts meetings to consider the acquisition of real property that the Illinois legislature could not have intended that it be a limitation on the State's eminent domain power. Moreover, the cases cited by the petitioners in support of this proposition of law are not in point. *Cuyahoga River Power Co.* v. *City of Akron*, 240 U.S. 462 (1916) and *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U.S. 226, 241 (1897) and *Weaver* v. *Pennsyl-*

vania-Ohio Power & Light Co., 10 F. 2d 759 (6th Cir. 1926), are cases where the condemning bodies were allegedly attempting to acquire property without compensation or for private interests without public necessity in clear violation of the 14th Amendment of the U. S. Constitution. In the case at bar, there is no allegation that the State of Illinois is attempting to acquire property without payment of compensation or for private interests. *Boom Co.* v. *Patterson*, 98 U.S. 403 (1878) cited by petitioners was a case transferred to the federal courts on the basis of diversity of citizenship and did not even involve an alleged federal claim.

(b)

THE "RIGHT" TO A PUBLIC HEARING EXISTS ONLY BY VIRTUE OF STATE LAW AND THE FAILURE TO PROVIDE SUCH A HEARING DOES NOT CONSTITUTE A DEPRIVATION OF FEDERAL DUE PROCESS.

The Illinois Meetings of Public Agencies Act is a law of the State of Illinois and no comparable provisions appear in the United States Constitution or in any federal statute. For a breach of any of the provisions of the Illinois Meetings of Public Agencies Act recourse can be had to the Illinois courts only, and no claim for relief exists in a federal court as there is no provision for such relief under the Constitution or laws of the United States.

In a long line of decisions this court and other courts have consistently and uniformly held that the failure to hold such meetings does not result in the deprivation of rights guaranteed by the due process clause of the United States Constitution. The Supreme Court of the United States, in *Rindge Co.* v. *Los Angeles County*, 262 U.S.

700 (1923), an appeal from highway condemnation proceedings which were instituted without prior notice to the owners and without public hearing of any kind, stated at page 709 of its opinion:

> "The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and *a hearing thereon is not essential to due process in the sense of the 14th Amendment.*' *Bragg* v. *Weaver*, 251 U.S. 57, 58, 64 L. Ed. 135, 136, 40 Sup. Ct. Rep. 62."

As in *Rindge*, the case now before this court involves the alleged deprivation of a federal right by failure to hold a public hearing before instituting state condemnation proceedings. The only factual distinction between the instant case and *Rindge* is that in the instant case a state statute *requires* that such public meetings be held (although, as argued previously, said statute specifically exempts meetings where the acquisition of real property is being considered), while in *Rindge* there was no such statute. The existence of a state statute, however, is not enough to give rise to a federal right. The state statute creates only a state remedy, and the *Rindge* holding that no *federal* right has been violated, is still applicable.

Two decisions by the Court of Appeals for the Seventh Circuit support the position that the existence of such a statutory requirement does not create any new rights: *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Fin. Agency*, 310 F. 2d 99 (7th Cir. 1962), *cert. de-*

nied 373 U.S. 914; and *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967), *cert. denied* 387 U.S. 932. In each of these cases a federal statute required that a public hearing be held by the governmental agency involved prior to instituting condemnation proceedings, much the same as the Illinois Act provides.[1]

In the *Green* case the court stated at page 7 of its opinion:

> "In *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Fin. Agency, supra*, similar claims of the inadequacy of a hearing were made, supported by the same jurisdictional allegations. As has already been stated, we held there that neither Section 105 (d) of the Housing Act nor Section 10 of the Administrative Procedure Act provides the basis for a federal right to judicial review of an urban renewal plan. We see no reason to reexamine our position in that case. Moreover, *no substantial federal question of due process is raised. Rindge Co.* v. *Los Angeles County*, 262 U.S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186 (1923); *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill. 1955). The district court properly dismissed Count II." (Emphasis added).

This Court denied certiorari in each case. 373 U.S. 914 (1962); 387 U.S. 932 (1967).

These two cases definitely establish that due process does not require public meetings before starting a pub-

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1. The Illinois Act was also in effect at the time of each of these cases, having been enacted July 11, 1957. Chap. 102, Ill. Rev. Stats. 1971, §42 et seq. Petitioner's statement that it was enacted after these cases were decided—with the implication that the result might have been different—is incorrect.

lic works project. The existence or non-existence of a statute was not considered a controlling factor in either decision. Indeed, a better argument could be made that a federal statute creates federal rights than the argument of petitioners that a state statute creates federal rights. In neither of these cases did the court consider the existence of the federal statute to be significant in reaching a decision.

Another case similar to the one now before the court is *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill., 1955). In that case plaintiffs alleged a violation of their federal constitutional rights as a result of the failure of the Toll Highway Commission, respondents' predecessor, to hold public hearings regarding the location of the proposed toll road. The court dismissed the action, holding that a federal question was not involved, stating:

> "Even if, as plaintiffs claim, defendants, in exercising their delegated discretion in locating the routes and termini of toll roads, have made mistakes, in failing to have the proposed Illinois toll road meet a similar Indiana road at the state line, or otherwise, that fact is not a sufficient reason for a federal court to assume jurisdiction under the due process clause of the United States constitution. These public officials are human beings. To err is human. On the other hand, if they are guilty of improper action due, not merely to error of judgment, but to bad faith, fraud, corruption, manifest oppression or a clear abuse of discretion, the state courts are open to those whose rights are threatened, *People* v. *State Toll Highway Commission*, 3 Ill. 2d 218, 120 N.E. 2d 35. Therefore, in such circumstances also, no resort to the federal courts is permitted. *In neither of these classes of cases is a federal question involved.*"

The decision in that case was affirmed by this court at 349 U.S. 942 (1955).

The petitioners cite cases for the proposition that where an alleged wrong is in violation of both a state and a federal law, a claimant can choose either the state or the federal forum to file his claim. *Monroe* v. *Pape*, 365 U.S. 167 (1960); *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932); *Smyth* v. *Ames*, 169 U.S. 466 (1898). These cases have no application to the case at bar since the alleged wrong—the denial of an open hearing—could violate only a state and not a federal law. To choose the federal forum, there must first be a federal remedy available.

We know of no cases holding that public hearings on highway construction projects are required by the 14th Amendment. The law is clearly to the contrary.

(c)

THE ENVIRONMENTAL "RIGHTS" ALLEGEDLY VIOLATED WITHOUT DUE PROCESS OF LAW ARE NOT RECOGNIZED AS LEGAL RIGHTS IN THE CONSTITUTION, STATUTES OR CASE LAW.

The petitioners allege that certain of their "rights" have been violated without due process of law since they were allegedly denied an open hearing prior to condemnation proceedings to acquire land for an Illinois Tollway extension. However, the very "rights" which petitioners allege were violated are not legally recognized rights and hence are not protected by due process. These so-called rights are the alleged rights to a healthful and protected environment. Such alleged environmental rights are afforded no legal recognition or protection in the constitution or statutes or by case law.

The petitioners argue that Congress has established a legal right to a healthful and protected environment in

the National Environmental Policy Act of 1969, 42 U.S.C., § 1421, et seq. However, as will appear more fully in the next section of this brief, that Act is limited to setting up procedural requirements for federal agencies aimed at requiring those agencies to recognize the environmental impact of federal projects. The Act does not establish or recognize the existence of any substantive environmental rights.

The cases cited by petitioners with regard to the existence of a federal claim where state officials arbitrarily and capriciously deprive a person of his legally protected rights are not in point because, in the case at bar, the petitioners were deprived of no legally protected rights. *Missouri Pacific Railway Company* v. *Humes*, 115 U.S. 512 (1885); *Bank of Columbia* v. *Okely*, 4 Wheat. (17 U.S.) 235 (1819).

The cases cited by petitioners with regard to the progressive and expanding nature of the concept of due process have reference to the changing definition of already recognized legal rights and are not authority for the judicial creation of completely new rights. *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Holden* v. *Hardy*, 169 U.S. 366 (1898).

It might be that at some future date Congress will establish certain definite legal rights with regard to the environment. When and if those legal rights are so established, they will be protected against violation without due process of law. But there cannot be a deprivation of due proces without regard to indefinite environmental "rights" which have no legal recognition.

III.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND THE ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970 ARE APPLICABLE ONLY TO FEDERAL AGENCIES AND CREATE NO SUBSTANTIVE RIGHTS UPON WHICH TO BASE A FEDERAL CLAIM AGAINST STATE DEFENDANTS.

The Court of Appeals, in holding that the National Environmental Policy Act of 1969, 42 U.S.C., § 4321, et seq. (N.E.P.A.), and the Environmental Quality Improvement Act of 1970, 42 U.S.C., § 4371, et seq. are applicable only to federal agencies and create no substantive rights, stated:

> "Since the procedural requirements of the National Environmental Policy Act are applicable only to federal agencies, it is patently clear that these requirements have no pertinence to the facts of this case. Other than the procedural requirements just mentioned, no judicially enforceable duties are created by either the National Environmental Policy Act or the Environmental Quality Improvement Act. The declarations of a national environmental policy and a statement of purpose appearing in these acts are not sufficient to establish substantive rights. For these reasons, the plaintiffs have asserted no cognizable federal rights under these statutes." (Appendix to Petition, 6A).

The arguments of the petitioners distort the clear purpose and meaning of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq., (NEPA) and the Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371 et seq. The petitioners isolate the initial section of each Act, while completely ignoring all the other sections, and attempt to argue that the Congress has

established the broadest possible set of environmental rights. In fact, when these Acts are viewed as a whole, it is clear that they establish no substantive rights whatever. Further, when the Acts are viewed as a whole it is equally clear that they apply exclusively to agencies of the federal government and have no application to a state agency or state officials.

The sections of these acts relied on by the petitioners were not intended to be enactments of law but rather Congressional policy averments to assist in understanding the more substantive provisions that follow. For example, the Bituminous Coal Conservation Act of 1935 contained in its initial section an extended Congressional declaration of the reasons why the welfare of the nation required the regulation of the bituminous coal industry and the remaining sections of that Act set out the manner of regulation, including the establishment of a national commission. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), the United States Supreme Court stated with regard to the declarations of the initial section of the Bituminous Coal Act that:

> "These declarations constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows.
>
> The substantive legislation begins with § 2, which establishes in the Department of the Interior a National Bituminous Coal Commission . . . : 298 U.S. 238 at 280.

In each of the environmental acts involved in the instant case the substantive legislation begins after the policy declarations of the initial sections and in each case includes the establishment of a new federal agency. However, each act clearly fails to give such rights of action

against state agencies and officers as are sought herein. These Acts, in their entirety, are set out in the appendix to this brief. A detailed discussion of each now follows.

(a)

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The National Environmental Policy Act of 1969, 42 U.S.C., § 4321 et seq. (NEPA), is a federal act passed by Congress to establish a Council on Environmental Quality and it is aimed at requiring Federal Agencies to recognize the environmental consequences of their actions. It compels Federal Agencies to satisfy certain procedural requirements with regard to the environmental impact of their policies. Nowhere in NEPA is there a reference to any state agency nor is the word "state" even mentioned. The highway extension involved in this case is a state project; the only respondents in this case are a state agency and state officials; and it is not alleged in the complaint that any funds other than state funds are involved. NEPA plainly does not impose any requirements, procedural or otherwise, on state agencies or state officials and the allegations of the complaint do not state a federal claim under NEPA.

The petitioners base their arguments only on Section 101 of NEPA, 42 U.S.C., § 4331 and completely ignore the rest of the Act. Section 101 of the Act is a statement of policy and therein Congress expresses concern over the damage that man has inflicted and continues to inflict on his environment. This broad policy stated in Section 101 is implemented in the following sections of NEPA. However, the implementation is expressly with

regard to federal agencies alone, and this is why the petitioners choose to ignore all but Section 101 of the Act.

The entire National Environmental Policy Act of 1969 is set out in the appendix to this brief. A reading of the Act as a whole clearly shows the Congressional intent to establish a broad national environmental policy and implement that policy by establishing a Council on Environmental Quality and setting up certain environmental procedure requirements for federal agencies.

NEPA begins with a Congressional declaration of purpose which states:

> "The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. § 4321.

After the declaration of purpose, the Act is divided into Title I and Title II. Section 101 of the initial title (the only section relied upon by petitioner) begins with a declaration of a broad national environmental policy. The broad policy of Section 101 is implemented with regard to federal agencies by the remaining sections of Title I, especially Section 102. Section 102 (c) provides that when any *federal* agency contemplates any major federal action which could significantly affect the quality of the human environment, it must prepare and file with the Council on Environmental Quality a "detailed impact statement" on:

"(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C., § 4332 (2) (c).

Title II of NEPA establishes the Council on Environmental Quality as part of the Executive Branch of government to assist the President in evaluating the environmental effect of the various programs and activities of the Federal Government. Title II also requires the President to annually transmit to Congress an "Environmental Quality Report."

NEPA does not declare any substantive environmental rights as argued by petitioners. Nor does it prohibit any particular activities or programs which might have a detrimental effect upon the environment. NEPA simply declares a broad national policy aimed at encouraging concern for the environment; sets up procedural requirements for federal agencies, such as the preparation and filing of environmental impact statements, to insure that federal agencies take environmental factors into consideration in planning federal programs; and, finally, through the Council on Environmental Quality, seeks to provide the President and the Congress with the necessary environmental information on which to base further legislation.

The Act as a whole appears as a logical and worthwhile initial venture by Congress into the area of environmental control. But it is clearly limited in its application to federal agencies. It is this clear limitation to federal agencies that leads the petitioners in their argument to ignore completely all but the initial section of NEPA. To succeed, the petitioners must read into this part of the Act, the creation of substantive rights against the state.

The words of the Act upon which the petitioners rely most in their attempt to "read in" substantive rights are contained in Section 101 (c) which provides:

> "(c) The Congress recognizes that each person *should* enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." (Emphasis added). 42 U.S.C. § 4331 (c).

Two significant points should be noted. Subsection (c) is limited by the introductory phrase, "The Congress recognizes", which immediately casts doubt as to its legal scope. But even more significant is that the word "should",[2] which is used to describe that to which each person is entitled in the way of a healthful environment, is not a word which presently delineates the specific rights of the individual or a word which now enjoins specific duties on any state or state agency. Had Congress wished to create a cause of action on behalf of persons

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2. While the word "should" is often used in the imperative ("You should keep to the right whenever driving on a two-lane highway") it is also often used to express the ideal ("People should not have to grow old and die"). As used in this Act the word "should" is clearly being used to express an ideal or goal which Congress hopes will some day be achieved.

aggrieved by a violation of the Act, it could have done so by clearly spelling out such a right. Indeed, the legislative history of the Act indicates that this possibility was considered and rejected, for the Senate bill originally contained a provision stating that Congress recognizes that

> " . . . each person *has a fundamental and inalienable right* to a healthful environment ***" (H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969). (Emphasis added).

It is submitted that even the wording of the original Senate bill would not have created a present "right". The wording of the statute as finally enacted, embodying a mere statement of what should be the case, clearly creates no cause of action.

The Senate bill was originated by Senator Jackson as S. 1075. The Report of the Senate Committee on Interior and Insular Affairs, after enumerating the environmental problems confronting the nation, states:

> "S. 1075 is designed to deal with many of the basic causes of these increasingly troublesome and often critical problems of domestic policy. A primary purpose of the bill is to restore public confidence in the Federal Government's capacity to achieve important public purposes and objectives and at the same time to maintain and enhance the quality of the environment. *It is the Committee's belief that S. 1075 will also provide a model and a demonstration to which State governments may look* in their efforts to reorganize local institutions and to establish local policies conducive to sound environmental management. This objective is of great importance because many of the most serious environmental problems the Nation faces are within the scope and, often, within the exclusive jurisdiction of State action and State re-

sponsibility." Cong. Record, July 10, 1969, p. 19010 (Emphasis added).

The Act, quite obviously, was merely intended first, as a statement of policy that environmental considerations shall form a part of all federal agency functions, planning and coordination, and, secondly, to create a Council on Environmental Quality. The discussions on the floors of the House and Senate indicate as much, and emphasize that the most important purpose of the Act was to create a Council which could share its findings with all other federal agencies, enabling them to develop meaningful environmental policies at lower levels of government. See 115 Cong Record, 91st Cong., 1st Sess., p. 26571-26591 and p. 29046-29065 (1969).

With regard to judicial enforcement of the provisions of NEPA, Federal agencies are charged with certain procedural requirements and the failure to comply, such as the failure to file an impact statement when major federal action which could affect the environment is contemplated, can result in a federal court review of their administrative action. *Calvert Cliffs* v. *A.E.C.*, 449 F. 2d 1109, (C.A.D.C., 1971) (Atomic Energy Commission —— filing of impact statement), *West Virginia Highlands Conserv.* v. *Island Creek Coal Co.*, 441 F. 2d 232 (4th Cir., 1971) (National Forest Supervisor—failure to file an impact statement); *Environmental Defense Fund* v. *Corps of Engineers of U.S. Army*, 325 F. Supp. 749 (E. D. Arkansas, 1971) (Corps of Engineers—where an insufficient impact statement was filed); *State Committee to Stop Sanguine* v. *Laird*, 317 F. Supp. 664 (W. D. Wisc., 1970) (Department of Defense—alleged failure to cooperate with other federal agencies on environmental fac-

tors); *Sierra Club* v. *Hardin*, 325 F. Supp. 99 (D. Alaska, 1971) (Secretary of Agriculture—filing of impact statement).

The federal courts have also held that the procedural requirements of NEPA do not apply retroactively. *Brooks* v. *Volpe*, 319 F. Supp. 90 (W. D. Wash., 1970); *Investment Syndicates, Inc.* v. *Richmond*, 318 F. Supp. 1038 (D. Oregon, 1970); *Pennsylvania Environmental Council, Inc.*, v. *Bartlett*, 315 F. Supp. 238 (M.D. Penn., 1970).

All the above cited cases deal with the procedural requirements placed on federal agencies by NEPA and the willingness of federal courts to enforce these procedural requirements. There are no reported cases enforcing individual environmental rights under NEPA because no such rights are created by NEPA and a complaint, such as the one in the instant case, which asserts a violation of these non-existent rights, does not state a claim of which federal courts may take cognizance.

The Federal courts have clearly held that a federal question is not presented under NEPA when purely state or local actions are involved. The Court of Appeals for the Fourth Circuit took this position in *Civic Improvement Committee* v. *Volpe*, —— F. Supp. —— (W.D.N.C., 1972) 459 F. 2d 957 (4th Cir., 1972) In that case the District Court had refused to issue a preliminary injunction against the widening of a city street financed solely by city money, on the grounds that the NEPA was not applicable to local projects. Plaintiffs therein apparently did not dispute this reasoning, but contended on appeal that because the street would tie in with other highway improvements which admittedly were federally funded, the project was sufficiently "federal" to involve the NEPA. The Court of Appeals disagreed, and held that

NEPA was not applicable because no major federal action was involved, and stated at page 958:

> "Despite the breadth of the NEPA we think there are doubtless local projects that may be destructive of environmental assets that are not within the ambit and protection of the Act. If America's environment is to be preserved in accordance with the national policy expressed by the Congress the gap will have to be filled with state and local legislation."

City of Boston v. *Volpe*, —— F. 2d —— (C.A. 1, 1972) [4 ERC 1337] was a suit to enjoin the Massachusetts Port Authority from expanding an airport taxiway. The Authority had applied for federal funds, but their application was returned by the F.A.A. because no environmental impact statement had been prepared. Construction was therefore begun with state funds, and the city sought to invoke the NEPA to halt the project on the grounds that the application for federal aid was sufficient to make the project "federal" and thus bring it within the scope of the NEPA. The lower court's denial of a request for a preliminary injunction was affirmed by the Court of Appeals. While the court did not squarely *hold* that federal funding was a *sine que non* for the NEPA to apply, it is evident from the opinion that the court clearly presumed this to be so, and relied upon that reasoning in reaching the conclusion that the NEPA did not apply.

Other Court of Appeals cases similarly hold that the procedural requirements of NEPA are limited in their application to federal agencies and federal projects. *Eli* v. *Velde*, 451 F. 2d 1130 (4th Cir., 1971); *Miltenberger* v. *Chesapeake and Ohio Railway Co.*, 450 F. 2d 971 (4th Cir., 1971).

Environmental Defense Fund v. *Corps of Engineers of the U.S. Army, et al.*, 325 F. Supp. 749 (E. D. Arkansas,

1971) is a case that enunciates the differences that exist between Section 101 and the other Sections of the National Environmental Policy Act of 1969. This was an action seeking to enjoin the Corps of Engineers of the United States Army, the Secretary of the Army and the Chief of Engineers from proceeding with the construction of a dam across an Arkansas river. The action was based on environmental factors and claimed jurisdiction under NEPA. The court held that Section 101 of NEPA was a statement of policy and created no substantive rights giving rise to the permanent enjoining of the dam project. The court further held that the plaintiffs were relegated to the procedural requirements under Section 102 of NEPA and entered a temporary injunction until the defendants filed the "detailed impact" statements required by Section 102 of NEPA. The court stated at page 755:

> "This brings us to the heart of the case which involves the interpretation and application of NEPA.
>
> "Plaintiffs contend that NEPA creates some 'substantive' rights in addition to its procedural requirements. They base this contention on the language contained in §101 of the Act. Although the Court may be oversimplifying their position in this respect, essentially they claim that the Act creates rights in the plaintiffs and others to 'safe, healthful, productive, and esthetically and culturally pleasing surroundings;' and to 'an environment which supports diversity and variety of individual choice,' and 'the widest range of beneficial values.' See §101(b). The Court disagrees.
>
> "Section 101 (a) takes note of the environmental problems facing the nation and then declares it to be the policy of the federal government to use all practical means 'to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other re-

quirements of present and future generations of Americans.' In order to carry out this policy, §101 (b) declares it to be the 'continuing responsibility of the Federal Government to use all practicable means *** to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—' attain certain stated objectives, including those quoted above, which plaintiffs contend create substantive rights.

"The Act appears to reflect a compromise, which, in the opinion of the Court, falls short of creating the type of 'substantive rights' claimed by the plaintiffs. Apparently the sponsors could obtain agreements only upon an Act which declared the national environmental policy. This represents a giant step, but just a step. It is true that the Act required the government 'to improve and coordinate Federal plans, functions, programs, and resources,' but it does not purport to vest in the plaintiffs, or anyone else, a 'right' to the type of environment envisioned therein.

"In the instant case it is clear that the damming of the Cossatot will reduce 'diversity and variety of individual choice.' It is apparently plaintiffs' view that upon the basis of such a finding the Court would have the power, and duty, ultimately and finally to prohibit the construction of a dam across the Cossatot. No reasonable interpretation of the Act would permit this conclusion. If the Congress had intended to leave it to the courts to determine such matters; if, indeed, it had intended to give up its own prerogatives and those of the executive agencies in this respect, it certainly would have used explicit language to accomplish such a far-reaching objective. In view of this interpretation of NEPA by the Court, the plaintiffs are relegated to the 'procedural' requirements of the Act."

The facts in the foregoing case involved a federal agency, federal officials and a federal project, and the Court

could find no substantive rights under Section 101 of NEPA. The instant case involves a state agency, state officials and a state project.

In *Tanner* v. *Armco Steel,* 3 E.R.C. 1968 (So. Dist. of Texas, 1972), the District Court in holding that NEPA created no substantive legal rights, stated at page 1972:

> "Had the Congress intended to create a positive and enforceable legal right or duty, it would have said so, and would not have limited itself to words of entreaty."

Senator Jackson, NEPA's principal sponsor, stated with reference to the procedural requirements of Section 102 that "[n]o agency will (now) be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions." He characterized the requirements of Section 102 as "action forcing" and stated that "[o]therwise, these lofty declarations [in Section 101] are nothing more than that." Hearings on S. 1075, S. 237 and S. 1752 before Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 206 (1969). See also *Calvert Cliff's* v. *A.E.C.,* 449 F. 2d 1109, 1113; (C.A.D.C., 1971).

When federal court complaints relying on NEPA for jurisdiction alleged the breach of duties other than the procedural requirements set out in NEPA, the courts have dismissed even though Federal agencies were involved.

In *Bucklein* v. *Volpe,* 2 E.R.C. 1082 (N.D. of Calif., 1970), a taxpayer brought an action in federal court for declaratory and injunctive relief against federal, state and county officials in connection with the performance of federal statutory duties regarding the application for and disbursement of federal emergency relief funds for

road repair. The local officials who were defendants were alleged to have violated procedural due process in the performance of their duties. Federal jurisdiction was based in part on alleged violations of the National Environmental Policy Act of 1969. The court dismissed the action for failure to state a claim upon which relief could be granted and with regard to NEPA stated at page 1083:

> "Moreover, it is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action. Aside from establishing the Council, the Act is simply a declaration of congressional policy; as such, it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment. 42 U.S.C., Section 4331. It is unlikely that such a generality could serve or was intended to serve as a source of court-enforcible duties." See also *San Francisco Tomorrow* v. *Romney*, 342 F. Supp. 77 (N.D. Calif. 1972).

In *McQueary* v. *Laird*, 449 F. 2d 608 (10th Cir., October 21, 1971), an action based on NEPA and brought by various residents of Colorado to enjoin the storing of chemicals and biological warfare agents at Rocky Mountain Arsenal, the district court dismissed the action and dismissal was affirmed on appeal with the Court of Appeals for the 10th Circuit, stating at page 612:

> "Public disclosure relating to military-defense facilities creates serious problems involving national security. We hold that NEPA does not create substantive rights in the plaintiff-appellants here to raise the environmental challenge in regard to the Rocky Mountain Arsenal."

In the instant case, the plaintiffs do not even refer to the procedural requirements of NEPA which clearly apply only to federal agencies and which provide the only court-enforcible duties under the Act.

The only case relied on by petitioners which in any way construes the provisions of NEPA is a district court case which does not appear in any official reports, *Izaak Walton League* v. *Macchia*, 2 E.R.C. 1661 (D. N.J., 1971). This was an action to enjoin the dredging and filling of certain tidal marshes by private land developers. Joined as defendants were officials of the State of New Jersey who allegedly had granted the developers permits for the dredging and filling operations. Also joined as defendants were Stanley A. Resor, Secretary of the United States Army and Colonel James A. Johnson, United States Army Corps of Engineers. With respect to the federal defendants it was alleged that part of the dredging and filling was in a navigable waterway of the United States and that it was taking place with the permission of these federal defendants and with a detrimental effect on the environment. Federal jurisdiction was alleged to exist on the basis of a variety of federal acts in addition to the recent environmental legislation involved in the instant case—the Water Quality Improvement Act of 1970, 33 U.S.C. §1151; Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §661 et seq.; Rivers and Harbors Act of 1899, 33 U.S.C. §403; and the Refuse Act of 1899, 33 U.S.C. §407. The District Court in the *Izaak Walton* case denied a motion to dismiss.

It is impossible to tell from the Court's opinion in *Izaac Walton* v. *Macchia*, *supra*, exactly on what basis the District Court found federal jurisdiction since the opinion itself deals mainly with the issue of standing and

the Court never specifies which of the many federal acts involved conferred jurisdiction. In any case, it is distinguishable from the instant case because it involved federal defendants and the acts allegedly detrimental to the environment (dredging and filling) were occurring in a navigable waterway of the United States and with the alleged approval of the United States Corps of Engineers. In the instant case there are no federal defendants and the acts allegedly detrimental to the environment involve the building of a state-funded tollway.

Nowhere in *Izaak Walton* v. *Macchia, supra,* does the Court indicate that NEPA establishes any substantive rights. However, the Court did state:

> "The Congressional intent is clear. The judicial function is to give force to the avowed legislative purpose and nowhere in the Acts is there any intimation that judicial review of administrative action is foreclosed. *Izaak Walton League* v. *Macchia,* 2 E.R.C. 1661, 1669-70 (D. N.J., 1971)"

This language makes it clear that the court is talking about reviewing administrative action and not enforcing substantive rights. A federal agency is involved in the case—the United States Corps of Engineers—and if the approval of the dredging and filling of a navigable waterway of the United States is a major federal action that could have substantial effect upon the environment, that federal agency was required under NEPA to prepare and file a proper environmental impact statement. Certainly a federal court has jurisdiction to determine compliance with the procedural requirements of NEPA. The administrative action of a federal agency is not involved in the instant case since no federal officials or federal agencies are defendants.

Federal court review under NEPA of the administrative action of a federal agency with regard to dredging and filling of a navigable waterway of the United States has occurred in another case. *Zabel* v. *Tabb*, 430 F. 2d 199 (5th Cir., 1970), was an action brought to compel the Secretary of the Army to issue a permit for dredging and filling in navigable waters of the United States. A ruling for the plaintiff was reversed by the Circuit Court of Appeals which upheld the administrative decision of a federal agency in denying such a permit for ecological reasons. Relying on the procedural mandates of NEPA to federal agencies, the Court held that the Secretary of the Army properly took ecological factors into consideration in weighing the application for such a permit. This is the real purpose of NEPA—to require federal agencies to weigh environmental factors in reaching decisions—not to establish substantive rights.

In its decision, the Court of Appeals held that the NEPA is directed to federal agencies and is not applicable to independent state or local governmental actions. Petitioners claim that the court was led astray in this respect by certain language found in *San Antonio Conservation Society* v. *Texas Highway Department*, 400 U.S. 968 (1970). Plaintiffs in that case sought to halt construction of a federally funded highway through a San Antonio park because the U.S. Department of Transportation had failed to prepare the required environmental impact statement. Although this court dissolved the stay order and denied certiorari, Mr. Justice Douglas wrote a strongly-worded dissenting opinion, arguing (as we interpret the opinion) that the NEPA was clearly applicable when federal funds and major federal actions were involved, and that failure of the government to prepare

an impact statement in those circumstances gave the federal courts jurisdiction. However, Justice Douglas also recognized that a federal question is not presented under the NEPA when purely state or local actions are complained of, stating "No federal question would, of course, be presented if Texas or San Antonio decided to turn these park lands into a biological desert." 400 U.S. 968 (1970).

While this statement in *San Antonio* may not have been essential to the opinion—since federal funding was in fact involved—we submit that it is a correct statement of the law.

(b)

THE ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970

The Environmental Quality Improvement Act of 1970, 42 U.S.C. §4371 et seq., is also relied on by petitioners in an effort to state a federal claim and establish federal jurisdiction. The Act is relatively short and contains only four sections, but it is clearly limited in its application to agencies of the federal government and has no application to the construction of a state-funded highway by state officials which is the subject matter of this case.

As they did with NEPA, the petitioners have confined their arguments to the initial section of the Environmental Quality Improvement Act and then only to part of this section. The plaintiffs conveniently ignore the part of the first section which sets out the purposes of the Act and which states:

"(c) The purposes of this chapter are—

(1) to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190." 42 U.S.C. § 4371 (c).

Both of the express purposes of the Act are implemented in the very next Section of the Act where the Congress establishes the Office of Environmental Quality. 42 U.S.C. § 4372. The Office of Environmental Quality is given the duties of assisting and advising the President on the policies and programs of the Federal Government affecting environmental quality. This new Office will provide the professional and administrative staff for the three-man Council on Environmental Quality established by NEPA and insure that other federal departments and agencies are implementing the policies set down by NEPA and other environmental laws. The final two sections of the Environmental Quality Improvement Act deal with reporting and funding. 42 U.S.C. § 4373 and § 4374.

Nowhere in the Act is there any mention that one of the purposes was to create "rights" in persons such as the plaintiffs; nor can any such rights be found by a reading of the statute as a whole or any part of the statute. Moreover, the discussions on the floor of the House and Senate with respect to this enactment do not reveal any such intent. [116 Cong. Record, March 24, 1970, pp. S 4392-4425; March 25, 1970, pp. H 2464-2473; 1970 U.S. Code Cong. and Adm. News p. 867].

It is therefore concluded that Congress did not intend to create the "rights" upon which plaintiffs have based their complaint. The statement by Congress which is relied on almost exclusively by the petitioners in their efforts to read substantive rights into the Act—that the primary responsibility for implementing the declared national environmental policy rests with state and local government—is a policy statement. This statement was meant to manifest an intent that federal and state governments cooperate to achieve a better environment through regional organizations, as is evidenced by the next sentence in the statute which the plaintiffs conveniently ignore:

> "The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law." 42 U.S.C. § 4371 (b) (3).

It is perhaps significant that, although there have been a number of case decisions based upon the National Environmental Policy Act of 1969, no such cases have arisen under the Environmental Quality Improvement Act of 1970. It is submitted that there is good reason for this: The "rights" upon which petitioners' complaint must stand or fall exist only in the minds of petitioners. To be enforceable in the federal courts the statute must manifest a Congressional intent to create a right, not to declare a policy. This the Act does not do.

CONCLUSION

Further review of this case is not warranted. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

(42 U.S.C. § 4321 et seq.)

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable

means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a

responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity ,and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major

natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest dryland, wetland, range, urban, suburban, and rural environment; (2) current and forseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to

formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

Sec. 204. It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authorative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere with the achievement of the policy set forth in title 1 of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement

of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

Sec. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

ENVIRONMENTAL QUALITY IMPROVEMENT ACT OF 1970

(42 U.S.C. § 4371 et seq.)

SHORT TITLE

Sec. 201. This title may be cited as the "Environmental Quality Improvement Act of 1970."

FINDINGS, DECLARATIONS, AND PURPOSES

Sec. 202. (a) The Congress finds—

(1) that man has caused changes in the environment;

(2) that many of these changes may affect the relationship between man and his environment; and

(3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b)(1) The Congress declares that there is a national policy for environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water

and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this title are—

(1) To assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Law 91-190.

OFFICE OF ENVIRONMENTAL QUALITY

Sec. 203. (a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this title referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Bureau of the Budget.

(c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions under this title and Public Law 91-190, except that he may employ no more than ten specialists and other experts without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and pay such specialist and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or expert shall be paid at a rate in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by—

(1) providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91-190;

(2) assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;

(3) reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;

(4) promoting the advancement of scientific knowledge of the effects of actions and technology on the

environment and encourage the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;

(5) assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;

(6) assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government;

(7) collecting, analyzing, and interpreting data and information on environmental quality, ecological research and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to sections 3648 and 3709 of the Revised Statutes (31 U.S.C. 529; 41 U.S.C. 5) in carrying out his functions.

REPORT

Sec. 204. Each Environmental Quality Report required by Public Law 91-190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

AUTHORIZATION

Sec. 205. There are hereby authorized to be appropriated not to exceed $500,000 for the fiscal year ending June 30, 1970, not to exceed $750,000 for the fiscal year ending June 30, 1971, not to exceed $1,250,000 for the fiscal year ending June 30, 1972, and not to exceed $1,500,000 for the fiscal year ending June 30, 1973. These authorizations are in addition to those contained in Public Law 91-190.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 469

BRADFORD TOWNSHIP, et al.,

Petitioners,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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In The

Supreme Court of the United States

October Term, 1972

No. 469

BRADFORD TOWNSHIP, et al,

Petitioners,

vs.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY, et al,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

[All italics ours; (App.) means Appendix to Petition; (R. App.) means Appendix from Court of Appeals.]

I.

PETITIONER HEREIN SETS FORTH NUMEROUS SPECIAL AND IMPORTANT REASONS FOR THE ISSUANCE OF CERTIORARI AND REVIEW BY THIS COURT.

Respondents clearly err in stating that Petitioners have made no attempt to propound any special or important reasons for granting certiorari. Their error is easily estab-

lished, since this Court in its rules and decisions has established a definition of what is important for a grant of certiorari and Petitioners case touches all of the criteria set forth therein.

Rule 19 1(b) of the Rules of the Supreme Court of the United States provides that it is important to the grant of certiorari that the Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeals. Such a conflict exists here. Under both Arguments I and II of the Petition herein the decision of the Seventh Circuit has been shown to be in conflict with that of the First, Third, Sixth, Ninth, Tenth and District of Columbia Circuits and thus this case qualifies for certiorari.

This rule also provides that an important issue is stated for certiorari when a Court of Appeals has decided a federal question in conflict with the applicable decisions of this Court. In Arguments I and II of the Petition more than twenty Supreme Court decisions are recited to demonstrate how the Seventh Circuit has disregarded and contravened Supreme Court decisions by its decision in this case and thus Petitioners have shown this case to be important for the granting of certiorari.

The same rule provides that an issue shall be deemed important when the Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of the supervision of this Court. Petitioners have demonstrated in Argument II of the Petition that the Court of Appeals for the Seventh Circuit ignored and contravened the well established rules of statutory interpretation established by this Court and rendered provisions placed in the body of Title I of the National

Environmental Policy Act, 42 U.S.C. §4331 (App. 18a-20a) null and unenforceable.

The said rule also provides that where an important issue of federal law which should be settled by this Court has not been so settled the issue is deemed important for the granting of certiorari. The nation is presently concerned about an environmental crisis. Congress too was concerned by this crisis and therefore enacted the National Environmental Policy Act. Congress found the state of the environment and its continued degradation a serious menace to the country and declared protection and enhancement of the environment important necessities. This case involves the same important issues of environmental degradation and calls for an immediate interpretation of this important Act of Congress. Congress intended and was confident that it had enacted legal, effective and enforceable provisions. The Court of Appeals for the Seventh Circuit, on the other hand, has ruled contrary to the concerns of the Act, contrary to the rules of statutory interpretation established by this Court, and contrary to the legislative history of the Act, thereby rendering entire sections of Title I of the Act legally ineffective, meaningless and unenforceable. The Seventh Circuit's decision could mislead other tribunals of this nation in a matter of grave national concern by its contravention of the wishes of Congress and its variance with the welfare of the nation. This Court is respectfully urged to interpret this Act and settle the law in this field so that unnecessary and irreparable harm is not done to this nation's environment in future years.

These are all important issues raised throughout the Petition for certiorari.

II.

ALL OF RESPONDENTS' CITATIONS ARE CLEARLY DISTINGUISHABLE FROM THIS CASE.

Respondents' opposition to the Petition for Certiorari is clearly without support and Respondents are reduced to seeking to distract this Court from the facts and issues herein by innuendo.

First, Respondents claim repeatedly that the Meetings of Public Agencies Act, 102 Ill. Rev. Stat. §42, does not apply because the Act exempts meetings concerning the acquisition of real property. This exemption has no bearing on the instant case because it applies only to those meetings in which specific parcels of land are marked for acquisition or condemnation proceedings are authorized. The Illinois State Toll Highway Authority or any other governmental body covered by the Act cannot hide its proceedings in closed sessions simply because of the possibility that at some future time presently undetermined parcels may be needed if the policy proposal to build a project is passed. The policy decision for expanding a toll highway system is a policy decision which must be made in a public meeting as is any decision to increase bonding of the toll highway system. The fact that certain acquisitions of real property or increased indebtedness may ultimately be required to expand a toll highway system cannot be used as an excuse to hold such policy meetings in secret which the legislature obviously provided should be open to the public. The decisions of the court below in no way rests on any claimed exemption nor even mentions such exemption.

The decisions below which Petitioners seek to have reviewed by this Court hold that the violation of the state

law alleged in the complaint may be actionable under state law but does not give rise to a federal cause of action. The decisions concern only the question of whether due process was violated because the required public meetings were not held and the proceedings which contravened the Open Meetings Act resulted in a taking and damaging of the property and environmental rights of Petitioners.

Respondents attempted to raise the statutory exemption before the Court of Appeals for the Seventh Circuit which did not consider the contention worthy to remark upon in its opinion. Not only is that contention irrelevant to the present review of the decision of the United States Court of Appeals for the Seventh Circuit, but it is also clearly out of order in this appeal. First, it is not mentioned by either of the courts below and at most is a question on the merits at trial. Because of this excursion by Respondents, Petitioners are compelled to state that if this case goes to trial Petitioners will prove that the meetings complained of were to make policy decisions determining first, whether an extension to the present Illinois State Toll Highway system should be built at all, and second, whether the bonded indebtedness of the Authority should be increased by $135,000,000. These meetings were held six months before any meeting to select, designate and approve any land for acquisition.

Furthermore, it is clear that whether the meetings are within or without the exemption is solely a matter for trial, because the factual content of the meetings determines whether the exemption is applicable. In their complaint Petitioners stated that meetings which should have been open were held secretly in violation of the Open Meetings Act, and on Respondent's motion to dismiss these allega-

tions must be taken as true. *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932) (R. App. 10).

Respondents also attempt to convince this Court that decisions which do not concern an imposed limitation upon the State's exercise of eminent domain apply to this case. Not one of Respondent's cases deals with statutory restrictions on the state's eminent domain power. For eminent domain to be used in the State of Illinois it must be for a lawfully conceived project and in strict compliance with the law. *Department of Public Works* v. *Ryan*, 357 Ill. 150 (1934); *South Park Comn'rs* v. *Ward & Co.*, 248 Ill. 299 (1910). Petitioners allege in their complaint that the project was illegally conceived in violation of statute and that said Toll Highway Authority has proceeded in violation of law. These facts make this case clearly distinguishable from *Combs* v. *Illinois State Toll Highway Commission*, 128 F. Supp. 305 (N.D. Ill. 1955), which arose and was decided prior to the Meetings of Public Agencies Act. *Rindge* v. *Los Angeles County*, 262 U.S. 700 (1923), supports the general rule that where a sovereign has not provided limitations on its power of eminent domain, a position quite different from that at bar, the common law and Constitution in the absence of such a statute do not of their own require a public hearing.

The case of *Harrison-Halsted Community Group* v. *Housing & Home Finance Agency*, 310 F. 2d 99 (7th Cir. 1962) and *Green Street Association* v. *Daley*, 373 F. 2d 1 (7th Cir. 1967) were attempts to enjoin state eminent domain because of failures to hold public hearings required under federal regulations controlling the procedure for granting federal money to projects. No question of state law was raised, argued or mentioned but the viola-

tion was solely of a federal requirement under federal funding regulations. Had an injunction been sought against federal funding rather than against the eminent domain power which existed independently of the federal financing the results would probably have been different. See Pet. 17. No state public meetings requirements were raised in those cases.

In the case at bar, however, state public meeting requirements are raised based on the Meetings of Public Agencies Act of Illinois which was vastly amended and expanded in June 1967 to cover for the first time *all* state agencies including the Illinois State Toll Highway Authority, Respondent herein. It is because of this state agency's violation of a state statute requiring public meetings at which the policy decisions to extend the toll highway system and to finance such an extension with bonds that state eminent domain proceedings should be enjoined. This state agency cannot violate state restrictions on its power of action which will take Petitioners' property and destroy their environmental rights without violating federal due process.

Each of the cases cited by Respondents concern an entirely different fact situation from that in the present case and Respondents can prove nothing relevant to this case by their citation of these authorities. In contrast, Petitioners have cited several decisions of this Court and of other circuits in which the question of a state's violation of a self-imposed restriction was found to violate federal due process under the Fourteenth Amendment to the United States Constitution. Because the Seventh Circuit's decision contravenes those relevant decisions of this Court and of other circuits it is respectfully urged that this Court grant certiorari and vindicate the authority of its decisions and

protect against encroachment of the federal due process rights of Petitioners.

III.

PETITIONERS' DEMONSTRATION, THAT THE DECISION BELOW WAS RENDERED IN CONTRAVENTION OF THIS COURT'S WELL-SETTLED AUTHORITIES AND THE DECISIONS OF OTHER CIRCUITS, IS ACKNOWLEDGED BY RESPONDENTS' SILENCE ON THIS ISSUE, AND FURTHERMORE, RESPONDENTS' ARGUMENT TO THE MERITS IS NOT ONLY IMPROPER AT THIS TIME BUT UNCONVINCING.

Whether the National Environmental Policy Act (NEPA) applies to the state agency and the individual Respondents in this suit is not an appropriate issue on certiorari but rather is a matter which goes to the merits of the case. However, since Defendants do raise this matter, Petitioners are compelled to reply.

The District Court and the Seventh Circuit disregarded this Court's numerous precedents concerning the proper canons of statutory interpretation, and thereby rendered a large portion of the body of Title I of NEPA meaningless and unenforceable surplusage. Respondents nowhere treat Petitioners' cases, and it is therefore starkly apparent that the relevant law of this Court has been ignored and its authority contravened. Respondents conveniently avoid this serious issue, and instead try to distract this Court from a proper consideration of the issues concerning certiorari by making certain premature assertions concerning the merits. Although Petitioners know that this Court will not be led astray by this tactic, and although these matters will be expounded upon when the merits are reached if this Court grants certiorari, Petitioners believe that they are compelled to out-

line their position briefly and to indicate the errors in Respondents' position.

First, Defendants misstate to this Court that the word "state" is not mentioned in Section 101 of NEPA, 42 U.S.C. 4331. This is simply untrue. It can be found clearly in Subsection (a) (App. 18a) of the said Section where Congress provides that the states should cooperate in the fulfillment of the national policy therein announced. Not only does the word "state" appear, contrary to Respondents' assertion, but the Environmental Quality Improvement Act which is an act *in pari materia* clearly states that the responsibility of implementing the national policy is on the state and local governments (App. 20a). In addition, a duty was clearly placed on the individual Respondents under Subsection (c) to protect and enhance the environment for the Petitioners' and other citizens' benefit.

The duty-creating words appear in the body of Title I of NEPA. This section is not an introduction to the Act. The introduction appears in Section 4321 of NEPA which comes before the designation Title I, and Petitioners do not rely upon Section 4321 for it simply conveys what Congress intends to accomplish in the titles which follow. Title I then follows, and in the body of Title I is Section 4331 which contains the pronouncement of a national policy for the protection and enhancement of the environment and for duties toward and rights in the environment. This policy and its attendant rights and duties come within the purposes set forth in Section 4321. Petitioners rely on Section 4331 which was intended by Congress to be an integral and effective part of Title I. (App. 18a-20a).

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936), relied upon by Respondents, is clearly distinguishable from the case at bar. Whereas the section relied upon by Petitioners in the case at bar affirmatively pronounces a national policy and uses duty and right-creating words, the section of the Bituminous Coal Conservation Act of 1935, 49 Stat. 991 (1935), interpreted in the *Carter* case did no more than list the evils which Congress identified as those which induced it to pass the substantive provisions of that Act.

Second, Respondents erroneously claim that NEPA only created a policy and is thus unenforceable. But policy is law, as this Court has held many times. *Morayne* v. *States Marine Lines,* 398 U.S. 375, 390-1 (1970); *Van Beeck* v. *Sabine Towing Co., Inc.*, 300 U.S. 342, 351 (1937); *accord*: *Johnson* v. *U. S.*, 163 Fed. 30, 32 (1st Cir. 1908) (Mr. Justice Holmes speaking for the Court and often quoted by the United States Supreme Court). Once Congress chooses and announces a policy it is the specific duty of the courts to give that policy effect. *Tag* v. *Rogers,* 267 F. 2d 664, 668 (D.C. Cir. 1959).

Respondents' third contention is equally at variance with the authority of this Court and with those canons of statutory interpretation which Petitioners seek to have vindicated here. Respondents attempt to have considered as a legitimate source of legislative history the comments of individual senators and representatives (see Res. Brief, pp. 24 and 29). This is against the holding of this Court and not competent evidence of the intention of Congress. *Maxwell* v. *Dow,* 176 U.S. 581, 601-2 (1900). Based on the comments of individual senators and rep-

resentatives setting forth their personal views in debate or in hearings, Respondents with this Court to isolate and ignore and render ineffective and unenforceable the whole of the first section appearing in the body of Title I of NEPA contrary to the plain and common meaning of the words used in that section. This Court has held many times that sections of acts should not be rendered unenforceable and that cases coming clearly within the terms of an act should not be exempted therefrom based on innuendo and remote inferences. *Ex parte Public Bank*, 278 U.S. 101, 104 (1928); *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1928); *Carter's Heirs* v. *Cutting & Wife*, 12 U.S. (8 Cran.) 251, 252 (1814).

Fourth, contrary to the plain meaning of the words used in the first section of Title I of NEPA, 42 U.S.C. §4331, Respondents maintain that the Act is addressed solely to the federal government. There is a difference, however, in the meaning of the words "national policy" which embraces the nation as a whole from that of a "federal policy" which is addressed to the federal government alone. See *U. S.* v. *Georgia Public Service Comm'n*, 371 U.S. 285, 292-3 (1963); *Public Utilities Com'n of California* v. *U. S.*, 355 U.S. 534, 544 (1958). The organization of Section 4331 also clearly demonstrates that the policy is national in scope. Subsection (a) states that the cooperation of the states is expected in effectuating the national policy, and the Environmental Improvement Act, 42 U.S.C. §4371, an act *in pari materia* declaring the same national policy, states, "The primary responsibility for implementing this policy rests with the State and local governments." 42 U.S.C. §4371. Subsection (b) is addressed to the federal government.

Subsection (c) clearly states that "each person has a responsibility to contribute to the preservation and enhancement of the environment." The fact that the next section of Title I spells out specific procedures for the federal government in order for that government to meet its responsibilities under the national policy does not make the duty of States and individuals ineffectual. Congress has two roles, one as a national legislature and the other as organizer and supervisor of federal governmental operations. In enacting Section 4331 Congress performed its role as the national legislature declaring a policy for the nation as a whole. In the second section of Title I, Congress acted in its second role as organizer and rule maker for the federal government, by prescribing specific procedures which the federal government must observe to comply with the policy set forth in Section 4331. The subparts of Section 4331, the first section in Title I, affecting States and individuals are left to the rule of reason. The fact that the report of the Senate Committee on Interior and Insular Affairs (S. 1075) cited by Respondents states that it was hoped that the second section of Title I would provide a model for state governments can only mean that the States might strengthen the national policy and comply with it by establishing similar procedural requirements. Without such procedural requirements the rule of reason still exists, and unreasonable and irresponsible disregard and destruction of the environment is an actionable violation of the national policy set by Congress. NEPA applies to the case at bar because the Act was law at the time the Toll Highway Authority made its decision to build the extension, and the wanton disregard and destruction of

the environment alleged by Petitioners in their complaint violated the national policy.

The cases cited by Respondents, *Civic Improvement Committee* v. *Volpe*, 459 F. 2d 957 (4th Cir. 1972); *City of Boston* v. *Volpe*, ... F. 2d ....., 4 E.R.C. 1337 (1st Cir. 1972); *Eli* v. *Velde*, 451 F. 2d 1130 (4th Cir. 1971); *Miltenberger* v. *Chesapeake & Ohio Ry. Co.*, 450 F. 2d 971 (4th Cir. 1971); *Bucklein* v. *Volpe*, 2 E.R.C. 1082 (N.D. Calif. 1970), are all clearly distinguishable from the case at bar. They were all actions either predominantly or solely against federal defendants and were concerned with procedural requirements under the second section of Title I of NEPA. *City of Boston* v. *Volpe*, ... F. 2d ....., 4 E.R.C. 1337 was not only based on the procedural requirements of the second section of Title I but on the federal regulations promulgated thereunder. *See* footnote 1 at 1337. The only issue in *Civic Improvement Committee* v. *Volpe*, 459 F. 2d 957 (4th Cir. 1972) was whether a partial preliminary injunction against federal defendants should be dissolved. The court dissolved the injunction because the federal defendants had no duties under the National Environmental Policy Act because the federal defendant had nothing to do with the state project. No decision was required as to NEPA's application to state defendants and this issue was not before the court. The language in the decision regarding the fact that the project was wholly state and therefore NEPA did not apply must be taken to mean that no obligation would devolve under NEPA on federal defendants until they participated in the project. In *Bucklein* v. *Volpe*, 2 E.R.C. 1082 (N.D. Calif. 1970), the Court specifically found that

"there had been ample consideration of environmental factors. Persuasive data was produced on both sides." *Id.* at 1083. The unresearched, unargued and unconsidered statement concerning this Act is not even persuasive dicta. The district court never indicated in its opinion that it had been directed to or was familiar with Section 4331(c). The district court was considering a situation in which the federal government was the defendant. The case of *Zabel* v. *Tabb*, 430 F. 2d 199 (5th Cir. 1970), was solely against the federal government and arose prior to NEPA becoming law as specifically pointed out at p. 213 of the opinion.

Respondents have acknowledged by their silence that the decision rendered below was made in disregard of the long line of authorities of this Court and in contravention of settled rules of statutory interpretation and statutory enforcement. Petitioners on the other hand have pointed out this disregard and violation of authority repeatedly. Respondents have produced no authoritative holding to support the Court of Appeals decision below. The Act in question is an extremely important one for the national welfare, and at this time of environmental crisis the national environmental policy clearly established by Congress as a response and remedy to the environmental crisis should be supported and enforced by this Court so that the decision of the Seventh Circuit, reached without regard to the principles of law and canons of statutory interpretation pronounced by this Court, will not lead other courts in the land astray to the detriment of all.

CONCLUSION.

In view of the foregoing, we respectfully submit that the Court of Appeals opinion below is in conflict with the rulings of this Court, other Circuit Courts, Federal Statutes and Constitutional provisions on important questions of federal law; that the recently recognized federal environmental rights and duties involved herein need further definition and clarification by this Court; that the effect of the decision is to cause confusion and uncertainty in the law with the resulting loss of substantial justice to citizens of the United States and will increase rather than decrease litigation in the United States courts of review unless the supervision and correcting authority of this Court is brought into use by granting the Writ of Certiorari.

Petitioners pray that the Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be allowed in this case and that on such review by this Court the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

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